17-418

SUPREME COURT OF THE UNITED STATES.

No. 189.

THE BANK OF ST. THOMAS

vs.

THE BRITISH BRIGANTINE JULIA BLAKE, HER TACKLE, APPAREL, FURNITURE, CARGO, &c.

BRIEF FOR THE BANK OF ST. THOMAS,

APPELLANTS.

GEORGE DEFOREST LORD,

OF COUNSEL.

SUPREME COURT

1

OF THE UNITED STATES.

THE BANK OF ST. THOMAS
Libellant and Appellant

against

THE BRITISH BRIGANTINE "*Julia Blake*," her tackle, apparel, furniture, cargo and the freight due thereon—WILLIAM T. CUNNINGHAM, GRAHAM P. CUNNINGHAM and WINTHROP R. CUNNINGHAM, Claimants of said cargo.

2

BRIEF FOR APPELLANTS.

On appeal from a Decree in Admiralty of the United States Circuit Court for the Southern District of New York, affirming a Decree of the United States District Court for the same District, dismissing as against the cargo the Libel filed to enforce a Bottomry bond, covering ship, freight and *cargo*.

3

STATEMENT OF THE CASE.

I. The facts on which the *appellants* rely are the following:

The "Julia Blake," Knowlton, Master, sailed from Rio de Janeiro March 31st, 1876, having as cargo 582 logs of rosewood—for which *three separate bills of lading* had been given (for 253, 139 and 190 logs, respectively) all made out in the name of the shipper, James Philip Mee of Rio de Janeiro, and *deliverable to his order*. (Record p. 33, fol. 70). Of this quantity *about* 200 logs *belonged to J. P. Mee, the shipper* himself, although the claimants had made advances on them to him. The rest belonged to the claimants. (Record p. 33, fol. 70, finding 1). J. P. Mee was also charterer for the vessel. The stipulated freight was £220 stg., of which £110 stg. had been paid in advance. (Record p. 33, fol. 71, finding 2). The remaining £110 stg. was ordered by the District Court to be paid toward satisfaction of the bond. (Record p. 27 fol. 59), from which the claimants do not appeal.

On May 4th, 1876, the vessel met with disaster at sea, losing her masts and part of her rigging, and sustaining other injuries from the thumping of the fallen spars while floating alongside, which compelled her to put into St. Thomas as a port of distress.

(Record p. 33, fol. 72, findings 4, 5).

She reached St. Thomas on May 27, 1876, where, upon two successive surveys held under the direction of the British Consul, it was recommended—*first*, that the cargo should be discharged, and the vessel stripped to stop the leaks—*second*, that repairs should be made, as afterwards was done.

(Record pp. 33, 34, fols. 71, 74, findings 6, 7, 10, 11, 19).

On sailing from Rio de Janeiro the Master had received from the shipper, J. P. Mee, a letter of instructions directing him to proceed to New York and there to consign his vessel and cargo to W. Cunningham & Sons of Philadelphia or their agents (the present claimants), or, if compelled by stress of weather to put into St. Thomas, (among other ports named) to consign his vessel to Lamb & Co. of that place.

(Record p. 33, fol. 71, finding 3). 7

After reaching St. Thomas, the Master made inquiries among the merchants there, and finally selected Lamb & Co. to attend to the ship's business and repairs. This selection was however accidental, for he told Lamb & Co. that he *had lost both his charter party, and the above letter of instructions.*

(Record p. 34, fol. 73, finding 14).

On May 27, 1876, the day of his arrival at St. Thomas the Master wrote to Peter Blake, the owner of the ship, at Parsboro, Nova Scotia, giving full details of the disaster, the ordering of a survey, and of the anticipated necessity of discharging cargo, and making extensive repairs. 8

(Record p. 34, fol. 73, finding 15. Copy of letter p. 36, fol. 79, Ex. No. 2).

He also telegraphed to said Blake on May 29, 1876, as follows: "Julia Blake, St. Thomas, dismasted, leaky, "consigned Lamb; sending survey mail."

(Record p. 36, fol. 79, Ex. No. 1).

Lamb & Co. also wrote to said Blake two letters under dates of June 13, and June 22, 1876—giving details of what was being done, asking in substance how funds were to be supplied, and (in the last) suggesting a resort to bottomry if other means for raising money were not furnished. (Record p. 37, fols. 80, 81, Exs. Nos. 3, 4). 9

On June 1, 1876, Lamb & Co. also wrote to the *shipper of the cargo* at Rio de Janeiro (J. P. Mee) advising him of the disaster, and of the steps which were being taken:—and adding—"Captain Knowlton tells us that "he has cabled the casualty to the United States. As "*the cargo is consigned to 'order' we have been unable* "*to acquaint the New York consignees of the misfor-*
"*tune.*

10 Record p. 38, fol. 82, Ex. No. 6).

This letter was received by said J. P. Mee on or before July 13, 1876, as appears by reference to a reply to it written on that day, contained in a second letter from Lamb & Co. to him under date of September 28, 1876.

(Record p. 38, fol. 83, Ex. No. 7).

The discharge of the cargo—the re-metalling—and the other repairs—were all proper and necessary to enable the vessel to complete her voyage.

11 (Record p. 35, fol. 75, findings 22, 23, 24).

On July 22, 1876, when the repairs were completed, the Master advertised for a bottomry loan, which the appellants' offered to make at 14 per cent. maritime interest, and their offer was excepted.

(Record, p. 34, fol. 74, Finding 20.)

The bond was dated August 5, 1876, and covered "ship, freight and cargo."

(Record pp. 11–13, fols. 24-28).

12 On the same day Aug. 5, 1876, the vessel sailed from St. Thomas, and on her arrival in New York, after due demand of payment and refusal, this libel was filed against "ship, freight and cargo."

(Record p. 35, fol. 76, finding 27).

II. The facts on which the *appellees* rely are believed to the following.

During all the time that *the* vessel was at St. Thomas —May 27 to August 5, 1876—there was facility for telegraphic communication between St. Thomas and *New York.*

And there was telegraphic communication between 13
St. Thomas and *Rio de Janeiro*, by way of New York, Lisbon and Pernambuco, from the time the vessel arrived at St. Thomas, *till July* 21, 1876. On the last named day, a break occurred in the cable between Bahia and Rio de Janeiro, but the Western Union Telegraph Co., continued to transmit telegrams from New York to Bahia, and they were forwarded thence by other means to Rio de Janeiro. The time required for transmission from New York to Rio, being about five days.

These lines of telegraph were often employed by mer-
chants and men of business in St. Thomas; and that 14
from St. Thomas to New York, was known to and used by *the claimants.*

(Record p. 34, fols. 73, 74, Findings 16, 17, 18).

The cargo was not perishable, and would not have been injured by being stored under cover at St. Thomas, for three or four months.

(Record p. 35, fol. 76, Finding 29).

St. Thomas is a central port where vessels go seeking 15
business, and to which parties requiring vessels also go. Vessels for the shipment of merchandise, are always available there.

(Record p. 35, fol. 76, Finding 30).

The rosewood aforesaid could have been forwarded

from St. Thomas by vessels, other than the Julia Blake, at an expense of $1,000 or $1,500.

(Record p. 35, fol. 77, Finding 31).

It was for the interest of the owners of said rosewood, that it should be so forwarded, rather than that it should be hypothecated to pay for the repairs of the Julia Blake.

16

(Record p. 35, fol. 77, finding 32).

The libellants had the means of ascertaining the facts last stated (mentioned in findings 30, 31, 32), before making the loan in question.

(Record p. 35, fol. 77, finding 33).

Lamb & Co. made no inquiry as to the necessity of the repairs and supplies, but relied on the statement of the master.

(Record p. 34, fol. 75, finding 21).

17

The only inquiry made by the libellants, was as to the sufficiency of the security in amount to satisfy the loan, and as to the regularity of the execution and attestation of the bottomry bond.

(Record p. 35, fol. 75, finding 25).

III. Upon the above facts the Court below deduced the following conclusions of law, viz.:

1. That the master should have communicated with the *owners* of the cargo, and informed them of the probable necessity of its hypothecation.

18

2. That the *bottomry lender* should have ascertained whether such communication had been had, and information given, before making the loan on the security of the cargo.

3. That no such communication having been made, or information given, *in time to enable the owners of the cargo to exercise the right of taking the cargo at the intermediate port*, this bond is invalid as to the cargo.

4. That the master should have made such communication by telegraph in this case.

19

5. That "because, under the circumstances of this "case it was reasonably practicable, for the "master to communicate with the owners of "the cargo, and inform them of the probable "necessity for hypothecating the cargo, before "doing so; and inasmuch as he hypothecated "the cargo without so communicating with, "and informing such owners, the bond *though* "*given and taken bona fide* is not binding on "the cargo."

(Record p. 35, fol. 77, 78. Conclusions of Law 1–5). 20

IV. The questions involved in this case therefore are:

1. Whether a rule exists in the admiralty law as administered in the Courts of the United States, requiring that the owners of cargo shall be communicated with, and informed of the probable necessity of he hypothecation before the master can make a bottomry bond which shall cover the cargo, as well as the ship and freight. 21

2. Whether if such rule exists this case is within the rule.

3. Whether the shipper of cargo has "*the right of taking the cargo at an intermediate port*,"

which is inferentially ascribed to him, in support of the supposed rule in the 3d conclusion of law.

4. Whether, if such rule exists, and should be applied under the circumstances of this case, this bond should be held void in toto, or good in
22 part, either (in the alternative.)

a. To the extent of the sum loaned, without the maritime premium—or

b. To the extent of the 200 (190) logs owned by *Mee* the shipper, with whom communication was actually had—or

23 *c.* At least to the extent of the proper contribution of the whole cargo to such of the repairs and expenses, paid for out of the bond, which were proper subjects for a general average.

All of these questions are believed to be properly raised by the "*requests to find* certain conclusions" duly submitted by the counsel for the libellants to the Circuit Court, and by the libellant's exceptions, both to the conclusions of law as found, and to the refusals to
24 find those which were requested.

See requests to find. Record p. 42, fol. 92-94.

See exceptions. Record p. 43, fol. 95-97.

ASSIGNMENT OF ERRORS.

The decree appealed from is claimed to be erroneous on the following grounds:

1. Because no such rule as was applied in the court below has ever existed in American admrality law; and the rule is unsound, fallacious, and impracticable as a rule.

2. Because the the reasons given in support of it, will be found on examination to rest upon insufficient grounds.

3. Because even if the rule were accepted as a rule, this case would not come under its application; or if so, it will be found to have been complied with as to so much of the cargo as belonged to J. P. Mee, the shipper.

4. Because even if the rule existed, and were applicable to this case, it would not lead to au absolute avoidance of the bond, but only to such a reduction of the recovery under it, as would replace the claimants in the precise position which they would have occupied in case the rule had been observed.

The following points are respectfully submitted in support of these views.

28

FIRST POINT.

The supposed rule, requiring a Master, whenever possible, to communicate with the *owners of the cargo*, before including it with the ship and freight in a bottomry bond, is exclusively an *English* rule of *recent origin*, and is unsupported by authority either in this or any other foreign country.

Even in England its existence and propriety are both questioned by some of the most learned and experienced judges.

It is, therefore, fairly an open question whether it shall be adopted into the admiralty law of the United
29 States or not.

I. The first step in this discussion should be to *state the rule* IN ITS BEST POSSIBLE FORM. This cannot be better done than by quoting the following passage from the Bonaparte (8 Moore's, Pr. C. p. 473), as explained in the Hamburg (1 Moore's Pr. C. N. S. 320)

The Court in the Bonaparte, says as follows:

"That it is an *universal rule* that the Master,
"if in a state of distress or pressure, before hypoth-
"ecating the cargo, must communicate, or endea-
"vor to communicate with the owners of the car-
30 "go, has not been alleged *and is a position that*
"*could not be maintained*, but it may safely, both
"on authority and on principle, be said that *in*
"*general* it is his duty to do so, or it is his duty
"in general to attempt to do so. *If according to*
"*the circumstances in which he is placed, it is rea-*
"*sonable that he should—if it is rational expect*
"*that he may—obtain an answer within a time not*
"*inconvenient with reference to the circumsances*
"*of the case then it must be taken upon authority*

"*and principle, that it is the duty of the Master*
"*to do so, or at least, to make the attempt.*" 31

As thus stated, the rule is claimed to be a *general rule with admitted exceptions*; its application is made to depend on the circumstances of each particular case, and chiefly *upon the ability to send the required communication, and receive an answer*, before the act of hypothecation shall become necessary.

Later cases have superadded the requirement that the communication shall advise the owner of the cargo, not only of the *disaster*, but also of the *probable necessity of hypothecating* his property. 32

The Oriental, 7 Moores' Pr. C. 398.
The Onward, L. R. (4 Adm. & Ecc.) 38.
Kleinwert *vs.* Cassa Maritima, L. R., (2 App. Cas. 156.)

But the rule itself, freed from details, is believed to be stated as above in its most favorable, and best guarded terms.

And the record shows that the Court below so understood, and sought so to apply it in this case.

(Record pp. 40, 41, and fols. 88-90. 33

II.—This is exclusively an English rule, and of very recent adoption. It has never been recognized in any other maritime code, and though now formally adopted in England, it has been opposed and criticized by some of the most learned admiralty judges there.

1. Sir R. Phillimore while applying the rule in

34 1868, admits its peculiar English character, in the following language:

"I think it will be found upon examination of "the foreign maritime law, that the bottomry "bond, under the various titles of contrat a la "grosse aventure, hypotheca, bodmer or cambio "maritimo, was *always considered as binding the* "*cargo; and that the necessity of a special com-* "*munication, if possible, of the Master with the* "*owner of the cargo according to the doctrine* "*of recent cases*, IS PECULIAR TO THE ENGLISH "LAW."

The Karnak, L. Rep., (2 Adm. & Ecc.) 308.

35 Certainly none but English cases have been cited to support it.

Not a single American case can be quoted in its favor.

Indeed, in the only American case previous to the present one in which the rule was discussed, the opinion of the Court was manifestly opposed to the rule.

The Eureka, 2 Lowell's Dec. 417 (1878).

And if the doctrines of the foreign jurists are regarded, they are in opposition to the principle
36 of this rule, for they hold that, even when the owner of the cargo is present, the Master may make a forced loan from him, by selling, if need be, a part of his cargo to obtain funds for the relief of the ship.

The Gratitudine, 3 C. Rob., 267, 269.

And a sale of part is equivalent to the hypothecation of the whole.

See Sir Wm. Scott's citations from and the Consolato del Mare, art. 105, in The Gratitudine 3 C. Rob., 267, (1801).

2. Even in England the rule is of recent adoption. 37

It has been attempted to trace back its origin, to the celebrated case of

The Gratitudine, 3 C. Rob., 240, [1801.]

But an examination of that case will show that the only question then before the Court was, whether the Master had under *any* circumstances the power *to hypothecate the cargo for the repairs of the ship.*

The only allusions made to the question now under discussion, viz.: whether, admitting such a power, the Master could exercise it, *without* 38 *first communicating with the owners of the cargo,* were two or three careless passages in Lord Stowell's opinion; the principal of which are to be found at pages 266 and 273 of the report, in that case; and that these dicta were not intended by Lord Stowell, to dispose of the matter discussed, is plainly to be seen from his masterly statement of the objections to the rule on p. 262, of the same report.

The objections thus stated by Lord Stowell, were referred to with evident approval, by Dr. Lushington, in the Olivier,1 Vern. Lush., p. 490, [1862]. 39

It is confidently claimed therefore that the Gratitudine, does not contain enough upon this question to be a safe foundation for so important a rule.

The Lord Cochrane, 2 W. Rob., 320, decided in Admiralty in 1844, and. Glascott *vs* Lang, 2 Phillips 310, decided in Chancery in 1847 are authorities *against the existence* of such a rule.

40 The first case in which it was ever stated, *and followed*, was

The Bonaparte 8 Moore's, Pr. C., 459, in which the Privy Council in 1853, *upon that ground* reversed a decree of Dr. Lushington upholding a bond against cargo.

The particulars of this case, with some comments on it, will be found in the "History of the Rule," which is appended to this brief. But it may be safely said that until 1853 this rule was unknown in England.

Lord Cottenham declared in 1844, that there was no such rule.

41 Glascott *vs.* Lang, 2 Phillips. 310.

And Dr. Lushington declared in 1863 that he was also ignorant of it though he had "*searched every reported case.*"

The Hamburg, 1 Br. and Lush. 264.

Dr. Lushington in 1859, refused to require previous communication with the owners of cargo, even in the case of a genuine respondentia bond in

The Cargo ex Sultan, Swabey, 504,

And he again heldit unnecessary in The Olivier 1 Vern. Lush., 484, (1862), in which case he gives
42 a graphic description of the practical embarrassments which an application of the rule must almost necessarily involve.

In 1863 the same judge applied the rule, though with manifest reluctance and only in obedience to the controlling authority of the Bonaparte, in the Hamburg, Bro. and Lush., 253, and his decree was affirmed by the Privy Council in 1864, in a *defensive* opinion given by Lord Kingsdown.

2 Pr. C., (N. S.) 289.

Sir Robert Phillemore, in the High Court of Admiralty in 1868, held a very slight excuse 43
for not communicating sufficient to dispense with the rule in

The Lizzie L. R. (2 Adm and Eec.), 254, and in the same year [1868] he held a very slight attempt at communication to be a sufficient compliance with it in

The Karnak L. R. [2 Adm. and Ecc.], 289, which was approved by the Privy Council on appeal in 1869.

L. R. [2 Pr. C.,] 505.

The rule was not enforced again to defeat a 44
bond until the case of

The Onward L. R. [4 Adm. & Ecc.] 38, decided in the High Court of Admiralty in 1873, when the rule was further extended, upon the sole authority of The Oriental [7 Morris Pr. C. p. 398], and it was held that the required communication must not only contain advice of the *disaster*, but also of the *probable hypothecation.*

3. The law, therefore, stood thus, even in England, in 1876, the time when the bond in this case was executed at St. Thomas, by the Master of the Julia Blake. 45

The rule now applied had never been promulgated until 1853, in the Bonaparte—had been restated and enforced in 1864, in the Hamburg—and extended and again enforced in 1873 in the *Onward.*

The rule had *not* been enforced in
The Cargo ex Sultan, Swabey, 504, (1859.)

46 The Olivier 1 Vern Lush. 484, (1862.)
The Lizzie, L. R., [2 Adm. and Ecc.] 254, (1868.)
Karnak, L. R., 2 Pr. C., 504, (1869.)

Yet the learned judges of the District and Circuit Courts have applied in this case, against suitors dwelling in a Danish Island, and who could not be presumed to be conversant with doctrines of maritime law *purely English* in their scope, and of but recent adoption in that country, the full rigor of the rule as decided in the *Onward*, with all its latest modifications, when it must be apparent that at the time when this bond upon the Julia Blake was given, that decision could
47 hardly have more than found its way into the most recent published reports, and thus into the libraries only of the best informed lawyers.

If, therefore, the claim above made—viz: that this rule is a rule of purely English authority, and not incorporated with the general maritime law of the world—its application in this case would seem to be both illogical and unjust.

4. The later case of Kleinwort *vs.* Cassa Marittima, L. R. (2 App. Cas.), 156, [1877], is of little moment in this discussion. It only reiterates the
48 doctrine of the Bonaparte, the Hamburg, and the Onward, already sufficiently established in the English courts.

But it was decided subsequent to the execution of this bond in 1876, and had it introduced any *new* rule, it could not fairly have been held applicable to this case. So far as it confirms the previous cases it is unnecessary.

5. Especially may it be said that a rule thus

originating, and so exclusively English, forms no part of the Admiralty law as adopted in this country. 49

The Lottawana, 21 Wallace, 558 [1874].

Unless, therefore, it can commend itself upon principles of justice, and practical commercial advantag, it has no claim to adoption here.

SECOND POINT.

The reasons which have been given to sustain this rule in England, have been founded upon several misunderstandings. 50

I. As to the extent of the Master's authority in cases of bottomry emergency.

II. As to his true relations (or agency) in the act of hypothecation.

A. Towards the owners of the cargo.

B. Towards the owners of the ship.

III. As to the general rights and obligations of the owners of cargo in such a contingency.

I 51

1. In the *earlier cases*, the *reason* given for requiring this communication with the owners of cargo was, that the Master's authority to deal with it at all grew out of the sole fact *of the owners absence.* Lord Kingsdown so states—in the Hamburg—where he uses the following language ; (Bro. & Lush, p. 279.)

"The character of agent for the owners of the "cargo is imposed upon the Master, *by the necess-*

52 "*ity of the case, and by that alone*; in the case, "supposed something must be done, and *there is* "*nobody present* who has authority to decide what "shall be done; the Master is invested by pre- "sumption of law, with authority to give direc- "tions on this ground, *that the owners have no* "*means of expressing their wishes*; but *when such* "*means exist; when commication can be made to* "*the owners, and they can geve their own orders*; "*the character of agent is not imposed upon the* "*Master, because the necessity which creates it does* "*not arise.*

53 This reason, though coupled with others more worthy of consideration, is quoted with approval by Sir. R. Phillemore, in the Lizzie, L. R. (2, Adam A Ecc.) 658. (1868.) and also by the learned Circuit Judge, who decided this case below record p. 41, fol. 89.

2. But if the Master's authorty *would be the same*, even when the owner of the cargo *might be present in person*, it must follow that the mere *ability to communicate with such owner would not destroy it.*

If the owner's *actual* presence would not take away that authority, neither would his *constructive* presense, which is all that can be implied from the ability to communicate with him.

54 Yet, if the Master's right to *sell* a part of the cargo stands (as it surely does) on the same footing with his right to *hypothecate* the whole, high authorities have held that the *owners presence does not affect that right.*

Lord Stowell on this point, says as follows:—in The Gratitudine 3 C., Rob. 276.

"In the next place, if I am right in considering
"*hypothecation of the whole*, as equivalent to *the* 55
"*sale of a part*, then *all authorities for a partial*
"*sale are authorities also for a total hypotheca-*
"*tion.*"

* * * * * *

"The passage which has been cited from the
"Consolato art 105 is applicable. There it is
"said, that a merchant *being on board a ship*
"*with his goods* * * * having money, was
"*obliged* to advance it for the necessites of the
"voyage; and, if he had not money, the Master
"*might sell a part of his lading.*"

* * * * * *

"The passage is very general in its terms, and *is*
"*by no means limited to the peculiar case in* 56
"*which the owner of the ship is likewise owner of*
the cargo."

The same right of the master—even when the owner is present—to *sell his goods* for the ship's necessities, is recognized by Washington, C. J., in Ross *vs.* Ship Active, 2 Wash. C. Ct., 237, 238.

He there says (p. 238): "If the master is una-
"ble to raise the money by any of the (other)
"means before mentioned, and without it is unable
"to prosecute the voyage, *the obligation of the*
"*merchant to advance becomes imperious.* * * *
"Even then he may *refuse to lend and* (Q. with
"what alternative?) *leave the master to his extra-* 57
"*ordinary power of selling a part of the cargo.*"

And Story, J., sustains the right to sell a part or *hypothecate* the whole, as being in the nature of a "*compulsive loan*," resting on grounds of necessity similar to those which justify "*jettison*," a right quite independent of the owner's *presence* or *absence.*

The Packet, 3 Mason, 255, 260 [1823].

58 His language is: "In the case of a sale of part "of the cargo by the master for the necessities of "the ship, the sale is in the nature of a *compul-* "*sive loan* for the benefit of all concerned, and to "enable the ship to prosecute her voyage. It "bears a considerable resemblance to the case of "a JETTISON, for the owner is *deprived* of his "property for the common good; and to him it "must be immaterial, whether the loss be by a "sacrifice at sea or on shore."

Lord Stowell had also made a similar comparison with cases of jettison, and ransom in The Gratitudine, 3 C. Rob., 258:

59 But the very idea of "compulsion" excludes the necessity of "*consultation.*" The master acts "*in invitum*" as to the owners of cargo.

4. And it is plain that if the right to *sell* part of the cargo for the ship's necessities must depend upon previous communication with the owner when practicable, such sales must be henceforth practically impossible. The owner of the part proposed to be sold—*if communicated with*—will invariably *forbid its sacrifice*, through selfishness. And thus, if the master's authority to sell is denied by law when he can communicate and *does* 60 *not;* and if it shall be (as it doubtless will be) expressly revoked when he *does* communicate, it must follow that, since nearly every port where repairs can be made, or cargo sold, is now within telegraphic communication with the *rest of the world*, the cases must be few indeed, where the Master can exercise this authority.

But if the transaction really amounts to a *compulsive loan*, then the compulsory element must rest upon something independant of the owner's

presence or absence; viz.: the ship's need of the repairs, and the Master's want of personal credit, and these constitute the two-fold necessity which has always been held to justify a bottomry loan. 61

Insurance Co., *vs.* Gossler, 96 U. S. Rep. (6 Otto,) 649. (1877.)

II.

1. But it is respectfully submitted that the nature of the Master's *agency* in selling a part, or in hypothecating the *whole*, of the cargo has been misunderstood in many of the cases, and this misunderstanding has helped to build up this rule. 62

The earlier cases carelessly treat him only (and exclusively) as agent of the *owner of cargo* in each of these transactions.

The Gratitudine, 3 C. Rob., 246, (1801).
The Hamburg, 2 Moore's P. C. C. (n. s.) 289, (1864.)

But it is now fully established that in each, he is agent of the *owner of the cargo*, only FOR THE PURPOSE OF GIVING A VALID TITLE to those with whom he deals in relation to it, but IN THUS APPROPRIATING THE PROPERTY TO THE PURPOSES OF THE SHIP, he is only agent for the *owner of the ship*. 63

This is distinctly stated in the best authorities.
Maclachlan on shipping (3 Ed.) 155.

And practical affect has been given to the distinction thus drawn by holding the shipowner liable

to re-imburse the owner of cargo for any burdens
64 thrown upon him by such sale or hypothecation.

Duncan *vs.* Benson, 1 Exch, 537, (1847.)
3 " 644, (1849.)
Recognized as still an authority in
The Olivier, 1 Vern Lush. 484, (1862.)

2. In this distribution of the Master's powers, the right *to give title* is necessarily only *subordinate* and *auxiliary* to the right *to appropriate the property.* If circumstances justify his resorting to the cargo at all to *relieve the necessities of the ship,* then it is essential to hold him as so far
65 agent for the *owner of the cargo,* that persons *dealing* with him shall be protected in their title.

But, inasmuch as this appropriation of the cargo is a *forced loan* from its owner to the *owner of the ship,* and which the latter is in law bound to make good, the Master in this *appropriation* is agent *only of the shipowner.*

This relation, therefore—rightly understood—militates strongly against this rule. For, if the *owner of the cargo* is not the Master's *principal* in regard to this act of appropriation, *why should*
66 *he be consulted* in regard to it? On the other hand, if this transaction is a forced loan, and if the *shipowner* is bound to make it good, why is not he the Master's *only principal,* and why should anyone else be consulted?

3. It is therefore claimed that this rule has been established partly upon reasons resting upon a misunderstanding of the Master's relations in these transactions, (*a*) towards the owners of the cargo, and (*b*) towards the owner of the ship.

III.

1. But other reasons have been suggested for the rule, which were held sufficient to support it in 67

The Lizzie L. R. (2 Adm. & Ecc.) 254 (1868.)

In this case Sir R. Phillimore—after stating the rule requiring communication—proceeds (p. 258) as follows:

"*For what purpose?* It has been said by "counsel for the bondholders *merely to give the* "*owner an opportunity of advancing the requi-* 68 "*site funds;* but I cannot think that this is the "ground which necessitates the communication. "*Another ground would surely be to give him an* "*opportunity of unloading the cargo altogether.* "I think, indeed, he could not do this without "payment of the entire freight.

* * * * * *

"If there be an opportunity for the owners to "express their will as *to either* of these two "grounds with respect to their cargo, the Master, "who is the agent from necessity, and not from "their choice, has no right *to deprive them of this* "*opportunity*, and therefore, must communicate 69 "with them, if it be reasonably within his power "to do so."

The reasons thus suggested, are practical, and at least the latter have influenced the decisions below.

Record pp. 35, 36, fol. 77.

Conclusion No. 3.

2. If the object of communicating with the

owner of cargo is to enable him to furnish funds,
70 if so inclined, then there is some reason for the rule.

But if the theory which makes this transaction a *forced loan* is correct, then it is evidently useless to communicate with the person whose proporty is to be taken. And further, it will be contended hereafter that if the object of communication be merely to allow an opportunity of furnishing funds, then the proper relief should be to place the owner of the cargo in the same position as if notice had been given him, viz. by decreeing for the bond, less the maritime premuim.

This will be discussed later.

71 3. Is the other reason above suggested for requiring such notice, viz., to enable the owner of cargo, to *claim its delivery at an intermediate port*, paying full freight, a good one?

Since it has been clearly already adopted as a controlling reason, in the decision below, it requires full discussion.

a. There are dicta in numerous cases which imply the existence of such a right, But these dicta are clearly *obiter*, and really amount to nothing more than statements that *payment of*
72 *full freight* would be an essential condition to the exercise of this right, *if assumed to exist.*
Such are the dicta found in the Lizzie, L. R. (2 Adm, and Ecc.) 254.

The Lizzie L. R. (Adm. and Ecc.), 254.
Onward, L. R. (4 Adm and Ecc.) 38.
Klemwort *vs.* Cassa Marittima, L. R. 2 Ap. Cases, 156 (1877).
Palmer *vs* Lorrillard, 16 Johns, 348 (1819).
Jordan *vs* Warren, Ins Co, 1 Story, 342.

And in one case the right is professedly founded on a "*usage of trade.*"

Tindall *vs* Taylor 4 El. and Bl. 217, (1854). 73

b. But it is claimed that no case can be found, where this alleged right has been the subject of the controversy, and in which the point has been distinctly passed upon. Should such a case now arise and this Court be called upon to determine whether the owner of cargo, even tendering full freight, could *claim* its delivery at an immediate port, no *authority* could be cited which would shut off the free discussion of the question *on principle* and as an original question. 74

c. But if this alleged right be examined *an principle* it cannot be sustained.

The general rule is clear—"a contract once "made cannot be dissolved except with the con-"sent of *both* contracting parties."

Tyndall *vs.* Taylor, 4 El. & Bl. 829.

It is equally clear that every contract must be interpreted and enforced according to the circumstances under which it was made, and is to be performed. 75

The mercantile adventure in a freighting voyage, is a complex transaction, involving peculiar relations and risks. Unlike similar contracts for transportation on land, the ship is bound to the cargo, and the cargo to the ship, and the different parts of the cargo to each other, in a manner which pledges each to the common undertaking to wit : the *prosecution of the voyage to its completion.*

Various considerations necessarily influence its
76 inception, and must affect both its interpretation and its enforcement.

The requirement of proper lading and stowage, —the great distance ordinarily to be traversed— the termination of the voyage in a foreign land and the ship's necessity of procuring a return cargo —the vicissitudes of navigation—and the chance of being driven into inhospitable ports where no resources are at hand—all these considerations must be present to the minds of both parties, when a contract of affreightment is made.

Many illustrations could be advanced to show
77 the practicable importance of these considerations. Perhaps *one* will suffice for all.

A ship owner being offered a profitable charter from China home—seeks an outward cargo to some Chinese port.

He is tendered a quantity of light goods, sufficient to half fill his ship on remunerative terms. In order to be able to transport these articles safely he agrees with the owners of some *heavy* goods, to take *them* upon terms in themselves unprofitable, and he fills up the remainder of his ship's capacity with an assorted cargo. Necessarily this whole adventure is before *his* mind and influ-
78 ences his action at each step. He would not go to China at all—but for his return charter. He would not take the *light* goods at the agreed freight —unless he could get the *heavy* goods upon terms which would pay *something*. He would not take the heavy goods at the freight agreed for them,— except that they take the place of ballast. And he would not have taken the assorted cargo, upon *its* freight,—except that it gave good stowage to his ship.

These considerations must all be, presumptively, equally bofore the minds of *each shipper of cargo.* They must all know that they are taking the ship to China, there to leave her to find her own way back; and they must know that the freights which they severally pay are affected by the character of the other cargo, and that the whole lading is made up with special reference to its different parts. 79

And *both parties* must also bear in mind that, amid the vicissitudes of a dangerous voyage, the ship and the cargo are necessarily bound to each other for its complete prosecution to the end; the ship's masts must be cut away if need be, to save the cargo; and the *cargo* jettisoned, to save the ship. Each, in turn, must help the other, and *whatever* is thus done for the common benefit, must be borne by all as a common calamity in equitable proportions. 80

It is impossible to conceive a sea voyage undertaken without the above considerations being before the minds of *all parties* interested, and the contract of affreightment, when made, should be interpreted and enforced in the light of these considerations.

Suppose a ship to sail for China under such circumstances, and so laden. She stops at Cape Town on her way. Now suppose the owners of the *heavy* cargo, tender their full freight and claim their goods, finding perhaps a better market there than in China; their *freight* has been adjusted upon the consideration that their portion of the cargo will serve for ballast *all the way to China.* Had it been shipped originally for the *Cape, and no farther*, a higher freight might have been asked. Should they be permitted now to *vary the* contract to the ship's prejudice? 81

82 Suppose the owners of the assorted cargo make a similar demand, also tendering full freight; what becomes of the ship's lading and stowage for the rest of the voyage. How is the Master to continue on his way with none but his *light goods*, and *ballast* if he can get it? He has undertaken with the owners of the light goods to keep his ship in seaworthy condition, which includes good stowage. He engaged to carry the other portions of his cargo, so that he might comply with this obligation. Is it not apparent that by thus allowing a departure from the contract by *any* of the parties to it, great injury must be caused, far beyond what the tender of *full freight* can make good.

83 But other difficulties must inevitably attend the assertion of this alleged right. Good stowage requires that the light goods should be placed on top, the heavy goods below, and the assorted cargo between the two. In order that the owners of the first two classes of goods may get them (if they have the right to claim them) the upper portion of the cargo must be unladen too—involving delay, expense, risk of breakage and other injury, and endless possible questions between *its* owners and the ship, resulting from this breaking of bulk at an intermediate port.

84 Who is to bear this expense, and how are these risks to be estimated, or provided for? The whole freight for the cargo delivered at the intermediate port might easily prove inadequate to satisfy the claims for damages which might thus be cast upon the ship from the owners of the remaining cargo.

Under such circumstances is the tender of full freight to suffice to compel the Master to deliver? or, even if an offer of indemnity be added thereto, is he to be compelled to incur the certain risks

attending that unlivery of his cargo, upon the contingencies of an indemnity bond?

85 Should not the Master rather have the right to say to all owners of his cargo,—I have undertaken to carry your goods to China—have stowed them with reference to an unbroken voyage—have assumed other obligations with a view to the completion of that specific contract—and have made all my arrangements on that basis; you also have reaped the advantages of all these considerations in the contract which I have made with you —and you cannot now break loose from the adventure, retaining all the benefits yourself and exposing me to risks and contingencies which were never contemplated.

86 But again—suppose the ship to put into the Cape as a *port of distress*—with a general average loss already incurred—not an uncommon case. The port of discharge of the whole cargo is the place where this general average must be adjusted and paid—and the Master has a lien on all the cargo till it is satisfied.

Can any part of that cargo be taken from him at an intermediate port—*under any circumstances*, or upon any tender?

87 Or, will any Court compel the Master to exchange his *lien upon the goods* for any bond of indemnity?

It is impossible.

It follows, therefore, that, when the supposed rule allowing the owner of cargo to reclaim it at an intermediate port, on payment of full freight, is *examined* with reference to any *practical application of it to the transactions of commerce*, it

will be found utterly to fail, even in the most
88 common vicissitudes of navigation. And if the question ever comes up for actual decision--the right must be denied.

Indeed, it is respectfully claimed that the claimants of *this* cargo, if they had received notice, could not have claimed its delivery at St. Thomas—as has been assumed in the Court below.

From the day when the Julia Blake deviated for St. Thomas until she again resumed her voy-
89 age—a general average claim began which included wages and provisions, cost of discharging and reloading cargo, and other items.

2 Parsons Ins., 257, 319.

This average could only be adjusted at New York the port of discharge.

2 Parsons Ins., 360.

Could the owner of this cargo then have compelled its delivery in St. Thomas even on paying full freight—or giving a bond for payment of his average contribution? Would any Court assume to pass in advance, upon the amount of that contribution or compel the Master to exchange his lien on the cargo, for *any* personal security.

90 The Cargo ex Galam, 2 Moore's P. C. [N. S.], 216, (1863).

THIRD POINT.

91

The rule itself is vague and unsatisfactory,—incapable of being formulated so as to be safely followed in practice. Instead of merely checking (as it was intended to do) *improvident* hypothecation, it will practically render *any* hypothecation impossible, and, save in rare and exceptional cases, the embarrassments which must attend the attempt to *enforce* it, must inevitably lead to its being *violated* or *dispensed with*.

If this indictment can be proved against this rule, and if, as has been already contended, it is *on trial* for admission into the admiralty law of this country, it should be condemned and excluded. 92

I.

It is vague and unsatisfactory,—incapable of being formulated so as to be safely followed in practice.

1. All rules of admiralty law should be simple and of easy application, for they must be acted upon by ship masters, merchants and tradesman in (often) out-of-the-way places, and by others from whom nice legal distinctions cannot be expected. Above all, these rules should rest upon *principle*, and be free from all *arbitray* features. If they *have* any 93 such *arbitrary* elements in them, that fact *should* be fatal to them as rules.

   The advocates of *this* rule have felt this pressure and have attempted to *formulate* it upon a basis of *principle*. This has resulted in the statement of the rule above given from the Bonaparte, which has been quoted with approval in the court below. If it be examined, it will be found that the necessity of communication is made to turn upon the question *whether an answer can be obtained*

within a time which will not be prejudicial to the
94 *necesity of immediate repairs.*

If this embraced the whole rule, whatever other difficulties it might involve, it would be intelligible and capable of application.

Any ship-master, any bottomry lender, could easily tell whether the ship's repairs could *wait* long enough to allow communication. If so, the communication must be made. Otherwise, not.

2. But the *cases* show that another factor intervenes to disturb the simplicity of this formula.

95 The *number of the owners*, all of whom must (if any), receive notice, plainly affects the application of the rule.

Lord Stowell admits that the rule would not apply if there were 100 owners.
The Gratitudine, *supra.*

Dr. Lushington refused to apply it—where there were only *twenty* owners.
The cargo ex Sultan Swabey, 504.

And Lord Kingsdown admits that the *number*
96 of the owners is one of the *circumstances* upon which the application of the rule must defend.
The Hamburgh, Bro. and Lush. 274.

Nay, common sense, without authority, would show that where the owners are numerous, communication is practically *impossible*.

Yet if the number of the owners *is* an element of any importance in determining the application of this rule, what guide does any known statement of it give to any ship master, or bottomry lender,

by which to know how short a list of owners will *call* for communication, or how long a list *dispense* with it? 97

Lord Stowell would surely di-pense with it in the case of 100 owners, and Dr. Lushington in the case of 20.

Lord Kingsdown does not commit himself beyond the case of a *single* owner, but Sir Robert Phillemore extends the rule to a case of *three*.

The Karnak, L. R. [2 Adm. & Ecc.] 309.

But those numbers are not fixed, or reliable On the contrary the rule as stated by Lord Kingsdown is purposely left *indefinite*, dependent upon *circumstances*, without saying *what* circumstances. 98

What shall be said then, as to this elememt in the application of the rule?

It is not vague and unsatisfactory,—incapable of formulation for *practial use?*

Can any ship master or bottomry lender, tell, from anything the Courts have said, whether he must communicate or not, if the number of owners exceeds *three*, but is less than *twenty*. The telegraph now renders it as practicable to communicate with a *hundred* as with *one*, and unless it be stated broadly that the rule applies *without regard to numbers*, there must remain an element of *arbitrary uncertainty about it*, which should exclude the rule from *any* commercial code. 99

II.

100

Again this rule plainly intended merely to check improvident hypothecation, will, in fact, render all hypothecation practically impossible.

1. Every hypothecation by bottomry should, and in practice generally *does* bind the *cargo* as well as the ship and freight. This is admitted by Sir Robert Phillemore in the following language in The Karnak, L. R. [2 Adm. & Ecc. 309.]

"I believe that the usual form of bond is upon
"ship, freight, and cargo, and that, according to
"the general maritime law, the *cargo* is included
101 "in the bottomry bond."

And Dr. Lushington holds in The Lord Cochrane, 2 W. Rob. 327, that such an inclusion is proper under ALL circumstances.

"And for this plain and obvious reason, that
"the ship and freight may be inadequate to
"discharge the bond, or it may happen as has
"frequently occurred in this Court, that the
"vessel though amply sufficient in value for the se-
"curity of the bond *at the time the bond is given*,
"from subsequent misfortunes may be wholly in-
102 "sufficient to discharge the payment upon her
"arrival at her port of destination. Looking to
"these contingencies, it is not unreasonable that
"the bondholder should require the cargo to be
"called in—in aid of his security,—and on legal
"principle I conceive he has a perfect right to do
"so. I apprehend the doctrine of the law to be
"that persons who advance money upon bottom-
"ry, *whatever may be the amount* which they
"undertake to advance—however they may look
"in the first instance to the value of the ship and
"freight, *are fullg entitled*, if they think fit *to*

"*demand the additional security of the cargo,* 103
"and to bind all three under the obligation of the
"bond for the repayment of the money ad-
"vanced."

2. If the practice thus stated and justified is correct, then *every* bottomry bond,—since it should include the cargo,—requires previous communication with the *owners* of the cargo.

Attempt to apply such a rule in practice, and no bottomry bond can ever be made.

A full rigged steamer of great value, on a voy- 104
age to a distant point on the west coast of South America, putting into St. Thomas in distress, would be unable to borrow even so small a sum as one-third of her estimated value on a bottomry bond in the usual form, without previous communication with the *owners of all her cargo.*

For no one would take the bond, with the worst half of the voyage still in prospect, unless it included the *cargo.* And if this rule applies they must all be notified in advance of the hypothecation, otherwise the bond will not be safe.

105

III.

But the best test of a rule is its practical working, and the question necessarily arises:

1. Is this rule capable of being acted upon, except in rare and almost isolated instances?

2. Does its application facilitate, or obstruct, the necessary operations of commerce?

1. In answering these questions the rule should be ap-

plied to the ordinary conditions of commerce, not
106 to those which are exceptional.

If this rule will only apply to cases where the cargo belongs to a *single person* as in

The Onward,

or to *three* persons, as in

The Karnack,

it would hardly be expedient to introduce a rule which would apply to those few cases, and to which all others would be exceptions.

In the great majority of instances, modern ships carry cargoes belonging to *many* owners.

107

It is also well known that, for reasons of mercantile convenience, the bills of lading are very often [if not generally] drawn to the *shippers'* order, as in the present case. And however drawn, they are, from the moment of their execution, negotiable.

2. Take now, to illustrate the working of this rule any large ship sailing from New York with an ordinary cargo on a distant voyage, say to China. It would be strange if she did not include in her cargo goods belonging to at least fifty
108 owners; and the Master would have signed at least that number of bills of lading, some to the order of the *shippers*—others to consignees in China who might, (or might not) be the actual *owners*.

These bills of lading would in many cases have been at once transferred—some to bankers as security for bills of exchange drawn against them—others to persons to whom the goods may have been sold "to arrive." Meantime, the only information concerning his cargo, which the *Master*

would have—would be his own copies of these several bills of lading. 109

3. Suppose the ship to put into Cape Town in need of repairs, and the Master to be without funds or credit. This constitutes (upon all the authorities,) a case of bottomry necessity; but, having half his voyage still before him, no one will lend upon security of the ship and freight, *without the cargo.* What is the Master to do?

Telegraphic communication exists from Cape Town to New York, and to every port in China. In a few days replies can be had from either point; the rule requiring communication would then apply if ever,—unless fifty should be held so large a number as to dispense with it, which no prudent lender would take the risk of. 110

But to whom shall the Master communicate?

To the *shippers* in New York in some cases, to the *consignees* in China, in others.
What happens then?

Both shippers and consignees, telegraph back that they have pledged or sold their goods, and give the names of the present owners; this necessitates fresh telegrams to the new parties, with perhaps the same result, growing out of new transfers. 111

Is it not clear that in such a case, with the most favorable opportunity for communication, the rule must break down by its weight, and the Master must abandon the attempt to communicate, and must bind the cargo on his own responsibility, from sheer inability to get at the real parties.

112 4. But suppose no tranfers of the cargo had been made and suppose the owners receiving the communication, were to act upon it.

Some might offer to furnish their share of the funds; some advise a bottomry bond; some claim to take their cargo, (if that right exists); and some either say nothing, or simply forbid any hypothecation of *their* goods. Is it not clear that the rule in question has only added to the embarrasment of the situation?

Either to follow, or to harmonize, such conflicting instructions would be simply impossible.

113 Must not the Master then after all—discarding the rule as impracticable—do what he ought to have done at first, viz., make his bond covering ship freight and cargo, and leave the owners of the cargo (if involved in loss thereby) to prosecute their recovery against the owners of the ship.

If that should be the result, then the rule would have broken down by its own weight, and under circumstances most favorable to its application.

114 Such a rule should not be adopted into the American Admiralty.

FOURTH POINT.

Should it be urged that, even if this rule would not work in ordinary cases, yet it can (and should) be applied in the present case; two reasons why it should not, can be given.

1. Admiralty rules should be *general*, and should apply to the vast majority of cases, or they should not be adopted at all. 115

They should be adapted to the general vicissitudes of commerce, not to a few isolated instances.

2. If the cases heretofore cited—in which a bottomry bond, given in a proper case of necessity, is likened to a jettison, in which the right to make it seems to exist even *in the presence*, (and as it were, in spite of) the owner, and in which this appropriation if the cargo is declared to be a "compulsive loan"—are correct, then the rule 116 proceeds upon a mistaken principle, and has no foundation to rest upon.

3. If the owner of the cargo has his remedy, ever against the owner of the ship *in person*, as has been decided, for the forced loan thus made, then *that* is his remedy, and there is no occasion to unsettle all the previous rules of admiralty by introducing this new and objectionable doctrine.

4. If the Master and bottomry lender, act with good faith, and if the repairs and supplies are such as 117 the vessel needed, and it was prudent to provide; then the instances in which a failure to communicate with the owners of the cargo can work a wrong, must necessarily be so few that the law could not undertake to provide specifically for them. They must be classed with other examples of the necessary imperfection of human laws.

Nor would the injury, even in those cases, ordinarily be serious. Most bottomry transactions involve general average losses, which can be in-

sured against and a share of the burden of the bond
118 equivalent to the cargo's contribution to the general average, would thus be thrown upon the *underwriters*, and for the balance the ship owner would be personally responsible.

Duncan *vs.* Benson 2 Exch. 644.

Thus the legal methods would be complete and systematical.

If the necessities of the ship required it, the Master would lay hold of the cargo and (with, or without, the owners permission) sell a part or hy-
119 pothecate the whole.

For so much of his loss thus incurred as the owner of the cargo would be responsible for, in general average, he would have recourse against his undrwriters; and for the balance against the ship owners.

And even, if in some instances, the ship owner might be unable to respond to this liability; the answer is two fold.

a. Legal rules are shaped according to their abstract working, not according to the ability of
120 individuals to respond to the burdens they impose.

b. Considering the complex relation between the parties to a frieghting voyage, and especially the fact that, before the cargo can be touched in bottomry, the ship and freight must be absolutely exhausted; it does not seem too much to require that the cargo should make some sacrifices to secure the common end (of which it alone, in the case supposed reaps the advantage), viz.; the completion of the voyage.

FIFTH POINT.

121

But even if the rule should be adopted in this country, it should not avail to defeat this bond, for the following reasons.

I.

The *shipper* was in this case, to all intents and purposes, the *owner* of this cargo. (Kleinwort *vs.* Cassa, Marittima, L. R. (2 App. Cas.) 156.) And Lamb & Co., being in fact *his chosen agents at St. Thomas*, to whom the Master was directed to resort in case of being driven into that port in distress, *their knowledge*, which was full and complete of all these transactions, was in law complete notice to the shipper of *everything,—of the bottomry necessity, as well as of the nature and necessity of the repairs.*

122

This fact at once explains why the shipper sent no instructions by telegraph, on receiving Lamb & Co.'s letter of June 1, 1876.

And it dispenses with the need of any further notice.

The vessel and her cargo were already in the hands of his *chosen agents.*

What more could be desire,—or have.

This suggestion should be conclusive on this case.

123

II.

But even had it been otherwise, and had Lamb & Co. been mere strangers to the shipper, a sufficient communication, was made, in due time, to the shipper himself, and he was the only person entitled, so far as appears, to represent this cargo.

124 1. The bills of lading were drawn to the shipper's order.

Although the Master in sailing received a letter of instructions, directing him to consign both vessel and cargo on arriving at New York, to W. C. Cunningham & Co. or their agents, yet, the Master declared to Lamb & Co. that he had lost that letter, and it nowhere appears either that his statement was false, or that he had ever read the letter, or knew in fact the names of the New York consignees.

125 Record, pp. 33, 34, fol. 71, 73.
Findings, No. 3, 14.

The vessel reached St. Thomas, May 27th, and on June 1st, Lamb & Co. wrote to the shippers at Rio, giving all details as then known, and expressly advising him of the following particulars, viz.: (*a*) that the cargo (*his cargo*) was being discharged for *effecting repairs;* and (*b*) that "as the "cargo was consigned to order," they (Lamb & Co.) had been "unable to acquaint the New York "consignees of the misfortune."

126 Record, p. 36, fol. 83, Ex. No. 6.

2. If the bills of lading were drawn to order, and if the Master had lost his letter of instruction, to whom else could notice have been sent?

There is no finding of bad faith on the part of the Master, but on the contrary, the record shows

the bond to have been "given and taken bona fide." 127

Record, p. 36, fol. 78, conclusion No. 5.

The letter of Lamb & Co. to the shippers, written June 1st, 1876, confirms the Master's statement, that he had lost the alleged letter of instructions.

Record, p. 38, fol. 83, Ex. No. 6.

Everything shows that the Master had at that 128
time no means of knowing who were the consignees, still less who might be the actual owners of the cargo.

How then could he be required to communicate with them?

III.

129

The communication thus sent to the shipper was a substantial and sufficient compliance with the rule:—and it contained all that it could then (or at any time previous to July 21, 1876, when the break occurred in the telegraph between St. Thomas and Rio), have been communicated to *any one*.

1. Lamb & Co.'s letter certainly informed the shipper that the cargo (*his cargo*) was being discharged

130 for repairs, which must necessarily lead to a bottomry—unless *some one* should furnish funds.

Record, p. 38; Fol. 82; Ex. No. 6.

He knew that one-third of the cargo (about 200 logs) *belonged* to him, in fact:—and the letter advised him that *no other owners of the remainder were known.*

The telegraph was as open to him as to others —and he might have telegraphed any instructions which he had to give. The vessel did not leave
131 St. Thomas until Aug. 5, 1876.

Record, p. 35; Fol. 76; Finding No. 27.

Yet the Court below has totally ignored *his* inaction—while holding the libellants to the strictest rules of telegraphic communication.

And that, too, simply with the result (as will hereafter be shown) of throwing upon the persons lending on this bond, the entire expense of repairs, unloading, &c., a great portion of which would
132 necessarily have fallen in general average on this very cargo.

2. Again—when this letter was written (June 1, 1876), the *first* survey (May 27), had been had, but not the second (June 8).

Record, pp. 33-34, fol. 72.
Findings Nos. 7, 11.

The ship owner had been informed of the state of affairs by telegram and letter, but no reply had yet been received from him. 133

Record, p. 36, fol, 79, 80.
Ex. No. 1, 2.

No one therefore then knew, either the extent or cost of the repairs, or whether the ship-owner would not furnish funds.

That a bottomry bond would be necessary, did not appear until *July 20th*, 1876, when Lamb and Co. received Peter Blake's letter of July 4th. 134

Record, p. 37, fol. 82.
Exhibit No. 5.

What more then could have been communicated to the shipper than was contained in Lamb and Co.'s letter of June 1st, 1876?

2. Certainly it cannot be required to communicate concerning an hypothecation, before the necessity for it should become reasonably imminent. And in this case that necessity did not appear before July 20th, when Blake's letter of July 4th was received. 135

For a shipmaster to notify the owners of his cargo, of the possibility of an hypothecation, the moment he puts into a strange port in distress, and before he knows what the ship owner will do for him, would lead only to confusion, and trouble. The owners of the cargo could not, and would not wish to make arrangements to meet an emergency which was only uncertainly foreshadowed.

136 They should not be troubled until the danger of bottomry became more imminent.

3. According to the earlier cases in which this rule was applied, *notice of the disaster* was considered sufficient.

The Gratitudine 3 C. Rob. 246.
The Bonaparte, 7 Moore, P. C. C., 459.

That the required notice should also refer to the *possibility of hypothecation*, was never suggested before the case of The Oriental.

137 No notice of anything beyond the disaster seems to have been given in the Karnak L. R. (2 Adm. and Ecc.), 290.

And the rule as applied in this case was never settled before the Onward, L. R. (4 Adm. and Ecc.) 38, 1873.

If the rule was what is now contended for, how could the final judgment of the Privy Council in the Bonaparte be sustained.

138 4. The well known policy of admiralty Courts in relation to bottomry bonds is a liberal one towards the bond holders, where (as in this case) the bond was "given and taken bona fide."

Record, p. 36, fo. 78.
Conclusion, No. 5.
The Vibilia, 1 W. Rob. 5, 1868.

The Prince George, 4 Moore's Pr. C. 28, 1862.

In the Prince George, the Court, says:

"Bottomry bonds, for the benefit of ship owners,
"and the general advantage of commerce, have 139
"been greatly favored in the Courts of Admiralty
"and where there is no suspicion of fraud every
"fair presumption is to be made to support
"them."

Is it a liberal, or even just treatment of the libellants in this case to hold them so strictly, not only to the rule requiring notice of the disaster, but even to the latest modification (only really adopted in 1873, in the Onward) requiring notice of a probable hypothecation?

IV. 140

From the time when the necessity of bottomry became apparent in this case, no communication was possible with the shipper, still less with the claimants as consignees, or owners of this cargo.

1. On July 21, 1876, (apparently) the day after the receipt of Peter Blake's letter of July 4, informing Lamb & Co., that a bottomry would be necessary, the telegraphic communication between St. Thomas and Rio was broken, and hereafter telegrams could not be sent, except by a circuitous route which, though known to the *claimants*, it does not appear that the libellants knew anything 141 about it.

   Record, p. 34, fol. 74; Finding, No. 17.

2. The correspondence between Lamb and Co., and the shipper shows that further communication with him by mail would not have been possible between July 20th and August 5th, when the vessel sailed.

142 Record, pp. 35, 38, fo. 76, 82, 83.
Finding, No. 27.
Exhibit, No. 6, 7.

Lamb & Co.'s letter of June 1st, does not appear to have reached Rio till July 13th, and Mee's letter of July 13th, did not reach St. Thomas till September 28th.

3. The consignees and owners, being still unknown the possibility of telegraphic communication with New York, was quite immaterial.

143

V.

The notice actually given by Lamb and Co. to the shipper, which was received by him prior to July 13th, was sufficient at least to bind his portion of the cargo, and the bond should have been held good as to that, say about 200 logs.

Record, y. 33, fo. 70.
Finding, No. 1.

1. The notice can be given by an agent for the ship,
144 as well as by the Master.

The Gratitudine, 3 C. Rob., 246.
Bonaparte, 7 Moore's P. C. 459.

2. Even if the claimants had "made advances," on this portion of the cargo, the general ownership remained in the shipper, and he alone was the owner.

3. The rule has never yet been extended to require

communication with a pledgee instead of the owner, or with both. 145

4. Unless the modification of the rule which was introduced by the Onward is to prevail, the owner of this portion of the cargo had a sufficient notice to have enabled him to act for his own interest.

The telegraph was as accessible to him, as to the the Master, and he could have communicated in time any directions he had to give.

146

VI.

The letter of June 1st to the shipper, notifying him that by reason of the cargo being consigned to order, it was impossible to acquaint the New York consignees with the misfortune, was at least *an attempt* on the part of the Master, and should be held a compliance with the rule, which only requires a *reasonable attempt* so to do.

The Bonaparte (*supra*).

147

In the Lizzie L R. (2 Adm. and Ecc. 254) the Master was excused from communicating with the owners of cargo, because he had written to the ship-owner *and thought that he would write to them.*

In this case the Master, and Lamb and Co. and the

148 Libellants had a right to expect that the shipper, being thus advised of the inability of Lamb and Co. to communicate with the New York consignees, would communicate with them himself.

The principle adopted in the Court below, of holding the Master and the bottomry lenders, to the strictest use of the telegraph, and ignoring its accessibility to the shipper and the claimants, is contrary to the liberal policy always exercised towards bottomry bonds.

149

SIXTH POINT.

The argument urged in the Court below, that this bond sacrificed the cargo for the benefit of the ship, is entirely fallacious and unworthy of consideration.

The contrary is, and always must be true.

150 1. The object of the bond in every case is to refit the ship, so that she can complete her contract of affreightment. That has been done in this case, and the cargo landed.

2. The necessary operation of the bond shows that the ship and freight must both be exhausted before the cargo can be resorted to.

The cargo alone therefore is benefited, and the ship and freight are the only things sacrificed.

SEVENTH POINT.

151

The failure to give notice, even if the rule requiring it be adopted, should not go farther than to defeat the claim for maritime premium.

1. The cases do establish that bottomry bonds given without a justifying necessity are void, for want of authority.

   But the necessity thus referred is the two-fold necessity which arises.

   a. From the need of repairs.

   b. From the inability to raise funds on credit. 152

   Ins. Co. *vs*. Gossler, 96 U. S. Rep., 655.

   Without these two conditions the Master should have no authority to hypothecate it, but given these, it is apparent that some one must raise money for the ship, and the object of giving notice to anyone, must be, to enable them to furnish bonds.

   This is certainly the object of notice to the ship-owner, and unless the owner of the cargo has the right to claim his cargo at the intermediate port, the object of giving notice to him should be the same. 153

2. The consequence of not giving this notice therefore should be, not to defeat the bond as having been given without a justifying necessity, but to put the parties in a position they would have occupied had they been notified. In that case they might have furnished the money and escaped the maritime interest. A failure to give notice

154 therefore, should only affect the maritime interest.

Judge Lowell remarks on this subject in

The Eureka, 2 Lowell, 417, 1873, are very sound.

He says : In this country, therefore, if notice is necessary, it goes only to the validity of the maritime premium.

* * * * * * *

"That a bond taken in good faith, and for an "honest advance, but turning out to be invalid for
155 "some technical reason will not destroy the tac- "it hypothecation, I hold to be well settled,

* * * * * * *

"for besides several decisions never over-ruled, it "is a just rule, adopted by all Courts which are "governed by equitable principles, and one of wide "application, that a good title shall never merge "in a bad one, excepting of course, in cases of "fraud."

See also the Hunter 1, Ware, 257, 1833.
The Packet 3 Mason, 259, 260.
Zodiac, 1 Hagg, 326.

156

EIGHTH POINT.

Even should it be held that the object of requiring notice be given to the owner of cargo was, not that they should advance money, but, that they might claim their cargo at the intermediate port ; the failure to give notice

should not defeat the bond so far as to relieve them from those payments which they would have been obliged to make, or tender, before they could thus claim their property. 157

In this case therefore the bond should be held good to the extent of the cargo's contributory liability in general average.

1. From the moment when the Julia Blake deviated for St. Thomas general average expenses began to be incurred, which embraced wages and provisions, cost of unloading and reloading, and all other expenditures needed for completion of the voyage. 158

   The cargo was bound for its share of these expenses, and the owners could not have claimed its delivery without paying them. Those expenses were defrayed by the money raised upon this bond, and the Court should uphold this bond to that extent.

2. In the Gratitudine, even the counsel who opposed the bond admitted the liability of the cargo under it to the extent of the general average contribution.

   To hold otherwise is to place the owner of cargo in a better position if he receives no notice, than if he were duly notified, and that to at the immediate expense of the innocent bond holder, whose money has gone to pay the obligations for which the cargo itself was bound. 159

   This is inequitable, and unnecessary.

160 NINTH POINT.

The English rule which has been applied in the Court below, should not govern this case.

The Gaetano & Maria, L. R. Pt. I, January, 1882, P. D. p. 1.

The only American rule known at the time of making this bond was that of

The Eureka, 2 Lowell's Dec., 417.

And this Court does not consider English decisions as
161 controlling in matters of admiralty law.

Reynolds *vs.* Vanderbilt, Alb. L. J., Dec. 9, 1882.

TENTH POINT.

The decree of the Circuit Court should therefore be reversed—or, at least, modified, in accordance with the above suggestions.

Dated December 26, 1882.

162

LORD, DAY & LORD,
Proctors for Lib'ts, Applts.

GEORGE DEFOREST LORD,
Advocate.

HISTORY OF THE RULE.

The first hint of the rule is to be found in the Gratitudine, 3 C. Rob. 246, decided by Lord Stowell in 1801. The Gratitudine, 3 C. Rob. 246, [1801.]

The bond in this case covered ship, freight and cargo, and was contested by the owners of cargo alone.

The vessel on a voyage from Trieste to London, put into Lisbon for needed repairs. The moneys were advanced by one Calvert, who was a correspondent of Powell, one of the *principal* consignees in London. Calvert wrote to Powell *news of the disaster* and Powell replied that 'it belonged to the Master to adopt every necessary "measure for the preservation of the cargo." Calvert took the bond under these circumstances.

The chief discussion, both in the argument and the opinion, was as to the Masters power under *any* circumstances, to hypothecate the cargo at all, a distinction being attempted to be drawn between this power, and the admitted power of selling a part.

The rule now in question was not involved, and this was admitted by Lord Kingsdown, in the Hamburg before the Privy Council, where he says, (2 Moore's Pr. C. N. S. p. 323.)

"*This was not the precise point for decision in that* "*case*, "but," he adds, "no one can read that admirable "judgment attentively, without perceiving that the duty "of communication with the owner of the cargo before "hypothecation under circumstances, and dependent on "circumstances, was familiar to the mind of the great "Judge who decided it."

In support of this latter assertion, Lord Kingsdown, in the same case, gathers together, (2 Movre's Pr. C. N. S. pp. 323, 324), the several remarks of Lord Stowell in the Gratitudine, which he considers to sustain the rule as one previously existing, and then well known.

But it is submitted that those remarks are nothing but loose speculations as to what the Court *might possibly* decide, under circumstances calling, (if they arose) for a consideration of this question. They certainly offer an insufficient ground work for so important a rule. Moreover, that Lord Stowell appreciated the *difficulties* which such a rule would involve, and that his mind was by no means clear on the subject, is very apparent from the following passage in his opinion which Lord Kingsdown *does not quote* in the Hamburg.

After stating a case of needed repairs to the ship, involving a necessity for money, he proceeds as follows.

"The first and most obvious fund for raising the money "is the hypothecation of the *ship*, but the foreign lender "has a right to elect his security, for he is not bound to "lend at all; he may refuse to lend on the security of "the ship, or on that security alone; it is no injustice "on his part, and if he does so refuse, the state of neces- "sity continues.

"The security of the ship not being sufficient, and the "Master not being able to raise money in that alone, "*what is he to do? It cannot be said that he is in all* "*cases to wait till he hears from a distant country.* The "repairs may be immediately necessary; it may be hoped "that the repairs may be far advanced before he can "hear from the consignees; *the Master may not know* "*the proprietors at all, but only the consignees; they may* "*be mere consignees, and have no power to direct him,* "*but in the single case of an absolute delivery to them,* "*if owners, they may be very numerous; for in a car-* "*rier ship, there may be one hundred owners of the cargo* "*and the Master may be in danger of receiving one* "*hundred different opinions. Supposing it were possible* "*for him to apply at all, what does the necessity of such* "*a case offer to be done. I conceive, one of two things,* "*to sell a part of the cargo, for the purpose of applying* "*the proceeds to the prosecution of the voyage by the re-* "*pair of the ship, or to hypothecate the whole for the* "*same purpose.*"

Comparing this passage with those *cited* by Lord Kingsdown, as above stated, it is respectfully doubted whether that learned Judge did not attribute to Lord Stowell, more fixed and definite opinions as to the existence of the proposed rule than he really entertained.

At all events *for* 43 years after the Gratitudine was decided, although it would appear that the custom of binding the cargo, with the ship and freight, in bottomry was quite familiar to the English admiralty (See the Gratitudine 3 C. Rob. 270.) This supposed rule does not appear to have been even asserted in argument, before any Admiralty Court in England.

We next hear of it in the Lord Cochrane, 2 W. Rob. 321, decided by Dr. Lustington in 1844. The Lord Cochrane, 2 W. Rob. 321, [1844.]

This vessel, on a voyage from Pernambuco to London, encountered disaster and put back for repairs. A bottomry bond was given, after due advertisement, on ship, freight, and cargo, which was contested by the owners of the cargo, and the point was distinctly taken (p. 325) that "*under the circumstances, the master was bound to* "*have communicated* (1.) *with the* SHIPPERS *of the cargo* "*(who resided in Pernambuco) in the first instance, and* "*should* (2.) *also have corresponded with the* OWNERS "AND CONSIGNEES IN ENGLAND. But Dr. Lushington enforced the bond holding:

1. *As to the shippers*—that the proceedings leading to the execution of the bond were such, that the shippers would be presumed to have had notice thereof.

2. *As to the owner and consignee*—that notice was not necessary.

    a. Because of the delay, it would occasion, and,

b. Because of its apparent futility.

The language of the Learned Judge (p. 334) was as follows: "The consequence (i. e. of "communicating with the owners) would have "been, that the ship and cargo would have been "locked up for a period of three months, *and* "*at the expiration of that time, he* (*i. e. the* "*master*) *would probably have been left to the* "*exercise of his own discretion*"

It seems clear from this passage that the opinion of this learned and experienced Admiralty Judge was from the first against the adoption of this rule, *by reason of the difficulties inherent in its application*, and many subsequent opinions rendered by him, show that to the last, he never changed his views.

In Glascott vs. Lang, 2 Phill. 310, [1847.]

In Glascott *vs.* Lang (2 Phillips 310) decided in Chancery by Lord Cottenham in 1847, an attempt was made to enjoin the prosecution of a bottomry bond against a ship, on the ground that the master had not communicated with his owner, although there had been time to do so.

The Vice Chancellor, Sir. James Lewis Knight Bruce, had decreed for the injunction, and, a cancellation of the bond on that ground, but Lord Cottenham reversed the decree, saying on the above point (p. 321) as follows: "Now, in the first place that is a ground "*which has no authority to support it.* I asked re- "peatedly during the argument, whether there was any "case to be found in which that circumstance had been "considered sufficient to avoid a Bottomry Bond, *but the* "*counsel were unable to produce one, or any case at all* "*like it.*"

Surely this solemn decision on the point by the Lord Chancellor may be properly set off against the dicta of Lord Stowell in the Gratitudine, as at least casting

doubt upon the existence of the rule in question, down to that time.

The real origin of the rule is to be found in the Bonaparte 8 Moore's Pr. C. 459, decided in 1853, in which the Privy Council reversed a decree of Dr. Lushington enforcing a bond against cargo, on the sole ground (*then first adopted*) that the Master had failed to communicate beforehand with the owners of the hypothecated cargo. The Bonaparte, 8 Moo e's Pr. C. 459, [1853]

It should be observed that this bond was ultimately enforced, proof being subsequently furnished (under leave granted) that a communication had been made, but the rule having in this case once been acted upon, the case itself should be carefully considered.

The Bonaparte, a Swedish vessel, on a voyage from a Swedish port to Hull, put into Stromstad in need of repairs. The Master having applied to the owners of the ship, in vain for funds, gave this bond, and completed his voyage.

The owners of cargo, in the Court below, disputed the bond and took the position on the argument (p. 308,) "that communication ought to have been made by the "Master to them (the owners) before the bond was "given," but Dr. Lushington overruled the point, and decreed for the bond. (See 3 W. Rob. 298, A. D. 1850.)

On appeal, the Privy Council, Sir James Lewis Knight Bruce [whose decision on a similer point, when he was Vice Chancellor, had been overruled by Lord Cottenham, in Glascott *vs.* Lang (*supra*)] delivering the opinion, reversed the decree on the single ground that the Master should have communicated with the owners of the cargo before hypothecating it.

The language of the Court is as follows, (p. 473.)

"That it is an universal rule, that the Master, if in a "state of distress or pressure, before hypothecating the "cargo, must communicate, or even endeavor to commu- "nicate, with the owner of the cargo, has not been al- "leged, and is a position that could not be maintained.

"but it may safely, both on authority and on principle, "be said that in *general* it is his duty to do so, or it is "his duty in general to *attempt* to do so; if, according to "the circumstances in which he is placed, it is reasona- "ble that he should—if it was rational to expect that he "might—obtain an answer within a time not inconve- "nient with reference to the circumstances of the case; "it must be taken therefore, upon authority and princi- "ple that it is the duty of the Master to do so, or at "least to make the attempt."

NOTE 1. It should be observed that this rule is stated as one not *universal*, but *general*, depending on the circumstances of each particular case, and especially, (if not exclusively) upon the probability of *getting a reply* within a reasonable time.

The consequence of this is, that at present, when telegraphic lines encircle the world, it is *always* (or almost always) possible to communicate with owners of cargo, however distant, and so *every case* is one in which such communication can be had, therefore, in no case (substantially) can a Master *now* bottomry the cargo without first consulting the owners, if this rule is to be applied, as here laid down.

NOTE 2. Again, Lord Justice Knight Bruce says that this rule is supported "*on authority*" as well as "*on principle.*" He does not cite a single case in support of this assertion, and the only cases cited in favor of the supposed rule in the argument, were,

Wallace *vs.* Fielding, (The Oriental) 7 Moore's, Pr. C. 398, 1850.
La Ysabel, 1 Dodson, 273.
Jones *vs.* Simons, 2 Q. B. 425.
Stonehouse *vs.* Ghent, 2 Q. B. 431.
Arthur *vs.* Barton, 6 M & W. 138.
Emerigon, Tom. 2, Ch. 4. § 4.

The Gratitudine is nowhere referred to.

And an examination of the cases cited as above, shows that *none* of them deal with the obligations or rights of the Master in relation to the owners of *cargo*, but only in relation to the owners of the *ship*.

Cargo ex. Sultan. Swabey 504 [1859.]

The question was next raised in. The cargo ex Sultan Swabey, 504, decided by Dr. Lushington in 1859.

This was a case of *Respondentia*, not of *Bottomry*, and therefore one in which the duty of communication with owners of the cargo would naturally be most strictly enforced.

The vessel having been injured beyond repair, this bond was given for money advanced to pay a salvage lien on the cargo. No communication was made, or attempted, by the master. There were about *twenty* owners of the cargo.

The Bonaparte was cited, but Dr. Lushington upheld the bond, and no appeal seems to have ever been taken.

The Hamburg, 1 Br. & Lush 253, [1863.]

Ten years elapsed after the case of the Bonaparte, (1853-1863,) years of most active commerce, and of gradually extending telegraphic communication, and therefore, years most favorable to develope fresh applications of this rule, if it were a sound one, before it was again enforced in the Hamburg, (Ct. of Adm.) 1 Br. & Lush. 253, (1863,) 2 Moore P. C. (N. S.) 289.

This vessel, on a voyage from Grey Town to Liverpool, put into St. Thomas in distress; the cargo was discharged and repairs made, the expense of which exceeded the value of ship and freight, and the Master gave a bond upon ship, freight and cargo.

It was proved that fortnightly mail communication existed between St. Thomas and Liverpool, and that the

master could have received an answer from the owners of the cargo, before giving the bond, if he had written to them. There were but *three* owners of the entire cargo, and *two* of them were named in two of the bills of lading, the other being drawn to shipper's order.

Dr. Lushington decreed as against the bond, so far the cargo was concerned, considering himself bound by the authority of the Bonaparte. But the reluctance with which he follows a rule which he manifestly disapproves is painfully apparent throughout his opinion, and he makes the following significant remarks, (p. 262.)

"The rule by which the court must now be guided "(*i. e.*, the rule of the Bonaparte) *is certainly not gener-* "*ally known in the various countries where bottomry* "*bonds are most usually taken*," and again (p. 264).

"I have entered more at length into the facts of this "case, and the principles upon which it ought to be de- "cided, because I believe that the rule applicable to "these *cases has not been generally known. I must ad-* "*mit my own ignorance of it, though I had searched* "*every reported case, and I was not ignorant alone, for* "*Lord Cottenham, after time had been allowed, and* "*strict examination made for every inquiry, declared* "*he was not satisfied that any such rule ever existed.* "*That was his judgment in Glascott vs. Lang*" (supra).

Here then is the statement of an experienced and distinguished admiralty judge that, so far as he knew, the rule was unknown except in England, and that, until the Bonaparte was decided in 1853, he believed (after an examination of every reported case) that it was *unknown even there.*

The case went to the Privy Council on appeal from Dr. Lushington's decree, and, although it would have been an easy thing for that court simply to affirm the decision below, yet the covert attacks of Dr. Lushington upon the rule itself could not well be passed over in silence, and Lord Kingsdown, in delivering the opinion

of the court, defends the rule, (1) upon principle (2) upon authority.

It is, however, most noticeable that he answers Dr. Lushington's challenge for some *reported case* on the subject, not by the citation of a long list of authorities such as the admiralty jurisprudence of England *should* have bristled with prior to 1864, if that rule *had been* familiarly known (as he claimed it was) and applied, but merely by quoting *selected* dicta from Lord Stowell's decision in the Gratitudine, omitting the one which is quoted above from the same case.

And he defends the rule upon principle, by stating two extreme cases for its application, in one of which it *would* apply, and in the other, *not*. And he then leaves it entirely to *circumstances* to determine whether it *should*, or should *not* be applied to all cases intermediate between these two extremes.

His language is important, for it is one of the most careful statements of the rule extant. He says (p. 274.)

> "It is clear that the rule as to communication
> "must be either that, in no case and under no
> "circumstances is it incumbent on the master
> "to communicate with the owners of the
> "cargo; or that, in some cases, and under
> "some circumstances, it is incumbent on him
> "so to do; either the universal negative or the
> "particular affirmative proposition must hold,
> "and both cannot be true, although one must
> "be. But it has not been contended and can-
> "not reasonably be argued, that the first propo-
> "sition is true. Where the cargo belongs to a
> "single individual known to the Master, the
> "ship in a port in the same country, or near to
> "it, in which that owner is resident, the means
> "of communication sure and speedy, the prob-
> "able delay inconsiderable, the cargo not of a
> "perishable kind, the money to be borrowed

"so large as to be sure to bring it within the "operation of the bond, it could not be conten- "ded that the Master could properly hypothe- "cate it for the repairs of the vessel without "first communicating with the owner. Equal- "ly clear is it that, where all these circumstan- "ces were reserved no such duty would "be incumbent on him. But if the first pro- "position be false, and the latter true, what is "in effect the practical conclusion but that the "question, whether a master must communi- "cate or not, is one which can only be decided "by the circumstances in each particular case?"

This is the rule, as now established and applied in England, a rule imposing a duty of *communication* with the owners of the cargo, before any Bottomry Bond affecting it can be made, dependent first upon the *possibility* of communication "within a time not inconvenient "with reference to the circumstances of the case," and second, upon the *number* of the owners to be consulted.

Lord Stowell in the Gratitudine clearly intimates, that *one hundred* such owners need *not* be consulted. (3 C. Rob. 262.)

Dr. Lushington in the Cargo ex. Sultan held that even *twenty* such owners need not be consulted (Swabey, p. 11.)

And Lord Kingsdown holds in the Hamburg that *three* must be consulted.

But no rule is given to determine the crucial number, and it must clearly be a great risk for the Master, under that rule, not to communicate with the owners *however numerous*, if only it can be done. No logical reason can be given why the owner of cargo should have it hypothecated without notice to him, merely because he is one of a *number*, when he must have previous notice, if he stands alone. The Master's authority as his agent, (if the rule rests upon the doctrine of agency,) should be no greater in one case than in the other.

And hence the rule, if good for anything, *as a rule* must be, in its modern application, that whenever the owners of cargo CAN be communicated with, within a time which the neeessity of the repairs will admit of, that communication must be made.

Any other statement of the rule leaves *too much*, to circumstances. No one will lend upon bottomry and take the risk of having the Court, in which the bond may be sued, declare that the *number* of the owners of cargo was not great enough to dispense with the required notice. The necessary practical result of this rule must be that the *lenders* will insist that, *in all cases*, the owners of cargo must be fully communicated with.

The doctrine was next appealed to, but without success in.

The Lizzie L. R. (2 Adm. and Ecc.) 254, decided in the High Ct. of Admiralty by Sir R. Phillemore in 2868. The Lizzie, L. R. (2 Adam and Ecc) 254, (1868).

This vessel, on a voyage from Minatitlan to Liverpool, put into Key West, for necessary repairs.

The master wrote to the owner of the vessel, who lived at Cardiff in Wales, but did not write to the owners of the cargo, who lived at Liverpool, and whose names appeared in the bill of lading. His reasons for not writing were "because he thought his owner in Cardiff would "write to them, and also that he thought he would not "get an answer before he left Key West."

This was held a sufficient reason to take this case out of the rule of the Bonaparte, and the bond was enforced against the cargo.

But this case is important, for it is the first case in which any intelligible reason of the rule, requiring this notice is given.

Sir R. Phillemore, after declaring it to be established by the Bonaparte and the Hamburg, that the master *must*, before hypothecating the cargo, communicate with the owner of it, adds as follows, (p. 259).

"*For what purpose?* It has been said by counsel for the bond holder, *merely to give the owner an opportunity* "*of advancing the requisite funds;* but I cannot think "that this is the *only* ground which necessitates the "communication. *Another ground would surely be, to* "*give him an opportunity of unlading the cargo alto-*"*gether.* I think, indeed, that he could not do this "without payment of the entire freight. If there be an "opportunity for the owners to express their will as to "either of these two grounds with respect to their cargo, "the Master, who is the agent of necessity, and not of "their choice, has no right to deprive them of this oppor-"tunity, and therefore must communicate with them, if "it be reasonably within his power to do so."

The rule, if supported, must in fact rest upon one, or both of these reasons.

The Karnak, L. R. (2 Adm and Ecc.) 289, (1868).

In The Karnak, L. R. 2 Adm and Ecc. 289, decided by Sir R. Phillemore in the same year (1868) as the Lizzie, a bond was upheld against the cargo, upon the ground that the master *had attempted* to communicate with the owner before hypothecating it.

This case contributes nothing new to the consideration of this rule, except that Sir R. Phillemore declares it to be, in, his opinion, an exclusively *English* rule. He says, (p. 308,) "I think it will be found upon examina-"tion of the foreign maritime law that the bottomry "bond, under the various titles of contrat á la grosse "aventure, hypotheca, bodmer, or cambio maritimo, "was always considered as binding the cargo, *and that,* "*the necessity of a special communication, if possible,* "*of the Master with the owner of the cargo, according to* "*the doctrine of recent cases, is peculiar to the English* "*law.*"

The next case is

The Onward L. R. (4 Adm. and Ecc.) 38, (1873).

The Onward L. R. (4 Adm. & Ecc). 38, decided in the High Court of Admiralty in 1873.

This vessel on a voyage from Moulmein to Queenstown

put into the Mauritius in distress. The Master (or the consignees) communicated the *disaster* immediately both to the owners of the ship at New York, and to the claimants at Glasgow, who were sole owners of the entire cargo. Later they also communicated to the ship owners the intention to take a bottomry—but did not notify the claimants of that intention. The ship owners, however, did communicate to the owners of cargo, what they had received on that subject—and in time for the claimants to have given any directions (if they had wished to) by telegraph to the Master at Mauritius.

The bond was held invalid as to the cargo—on the authority of the Bonaparte and the Hamburg—and this new requirement was added to the rule—on the authority of the Oriental 7 Moore's Pr. C., viz.: that the communication must contain notice not only of the *disaster*, but of the *prebable necessity* of hypothecation.

Kleinwort *vs.* Cassa Marittima, L. R. 2) app. Cas.) 156 (1877).

Kleinwort vs. Cape Marittima L. R. (2 app. Cas.) 156,(1877).

The ship "Maria Luisa" on a voyage from Rangoon to England put into Trincomalee for repairs on September 7, 1872.

Two days after his arrival the Master telegraphed to Gerber, Christian & Co. *the shippers*—to whose order the bills of lading were issued—that the vessel was leaking and in want of repairs. (See p. 160).

On September 19, G. C. & Co. telegraphed back for further information (see p. 161)—and they *wrote* to the same effect on November 1, (p. 161).

The Master made no reply to either communication—but on December 10, agreed with the Cassa Marittima for an hypothecation.—the bond was executed March 12, 1873. (See p. 159).

The bond was held void as against the cargo—on the authority of cases already cited—principally of The

Onward. No new doctrine is proclaimed —but the Court distinctly admits that in that case, the bills of lading being drawn to the *shipper's* order, *they* were the proper persons to be communicated with.

American Law.

The only case—except the present one—in which this question has been discussed, is

The Eureka, 2 Lowell's Dec., 417 (1873).

Careful attention is invited to this case, for *all* of the English authorities down to and including the Onward, are fully examined, and the Court came to the following definite conclusions:

1. That the rule requiring notice before hypothecation—though now settled in England—"has never been adopted in the United States" (p. 418).
2. That "if notice is necessary, the want of it goes "only to the validity of the maratime premium" (p. 418).

OFFICE SUPREME COURT U.S.
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17-418

Supreme Court of the United States.

OCTOBER TERM, 1882. No. 189.

THE BANK OF ST. THOMAS,

Appellant,

vs.

The British Brigantine JULIA BLAKE, her Tackle, Cargo, &c.,

WINTHROP CUNNINGHAM and SONS, Claimants of Cargo,

Appellees.

BRIEF FOR APPELLEES.

EVERETT P. WHEELER,

Advocate.

Supreme Court

OF THE UNITED STATES.

THE BANK OF ST. THOMAS,
Appellant,

vs.

THE JULIA BLAKE, &c., her cargo and freight, WILLIAM T. CUNNINGHAM, and others, claimants of cargo,
Appellees.

October Term, 1882,

No. 189.

Brief for Claimants of Cargo.

This is an appeal taken by the owners of a bottomry bond on the brigantine, Julia Blake, and her cargo, from a decree of the Circuit Court for the Southern District of New York, dismissing the libel as against the cargo. The libel was sustained in the District Court as to the vessel and freight, and no appeal was taken from its decree as to them. The findings of the learned Circuit Judge state the facts of the case (pp. 33–39). It is, therefore, unnecessary to re-state them here. It may, however, be said briefly, that the Julia Blake sailed from Rio Janeiro for New York, with a cargo of rosewood, belonging partly to Winthrop Cunningham & Sons, of Philadelphia, and partly to James Philip Mee, of Rio. The claimants had made advances to Mee upon his portion (Finding 1, p. 33). She was consigned to Messrs. Cunningham. The bills of lading were drawn to order (Findings 1, 3, p. 33).

The libellants admitted that the Julia Blake was unseaworthy when she left that port (p. 18). In the course of

the voyage she lost her foretopmast, her main mast, her jib boom and several sails, and put into St. Thomas in distress. A survey was had, and the surveyors recommended that the ship discharge her cargo. It was discharged and stored (Findings 4–11, pp. 33–34). A second survey was afterwards had (Findings 12–13, p. 34).

Meanwhile, Captain Knowlton, and afterwards Messrs. Lamb & Co., to whom the captain had orders to apply, should he be compelled to put in at St. Thomas, communicated with the owner of the ship, and Lamb & Co. wrote to him and the consignor (Finding 3, p. 33; Findings 14, 15, p. 34 ; Schedule A., pp. 36–39). They might have communicated with him by telegraph, but did not, and the letter reached him too late to be of any service (Findings 16, 17, p. 34. Ex. 7, p. 38). The owner of the vessel advised raising the money by bottomry, and the captain advertised for a loan of seven thousand five hundred dollars. The libellants made a tender of that amount at 14 per cent. interest, and this was accepted (Finding 20, p. 34). The amount was subsequently increased to eleven thousand six hundred dollars, without any new advertisement (Findings 26, 27, p. 35). No inquiry was made by the lenders of the money as to whether the repairs were necessary, or as to why the amount loaned was so much in excess of the amount advertised for. All they did was to see that the security offered was sufficient in value, and that the bond was properly executed (Finding 25, p. 35).

It is found that the repairs were necessary to make the brigantine seaworthy for the voyage to New York (Finding 24, p. 35), but there is no finding as to their value. It is further found, that the cargo was imperishable, that it could have been forwarded to New York by vessels other than the Julia Blake, at an expense of from $1000 to $1500, and that it was for the interest of the owners of the cargo that it should be so forwarded rather than it should be hypothecated to pay for repairs to the Julia Blake, and that the libellants had the means of ascertaining these facts (Findings 29–32, p. 35).

The case was heard in the District Court, before Judge Choate, and in the Circuit Court, before Judge Blatchford. Their opinions are at pages 17–27 and 39–42. The case is reported, 16 Blatchf., 472.

This is the case of an unseaworthy vessel, the repairs to which greatly exceeded her value. They were made while her cargo was discharged, and while it could have been forwarded to its destination by other vessels. They were made without inquiry, by Lamb & Co., as to their necessity, and without inquiry by the lender of the money, on any subject, except the sufficiency of the security offered, which was the ship and cargo. They were made without any communication with the owners of the cargo, who were readily accessible by telegraph, and without any inquiry on the part of the lender as to whether such communication had been made. The vessel, when she reached New York, sold for $4,500; less than half the amount of the repairs (Finding 28, p. 35), although no stress of weather or other circumstances, is found to indicate any intermediate deterioration, and there is no finding that the repairs were worth the money advanced by the lender to the captain. On the contrary, the fair inference, from the discrepancy between the amount loaned and the value of the ship after the repairs, is that the Captain pocketed a large proportion of the money which he received on the bottomry bond. Whatever, therefore, may be the general rule, and whether this Court is prepared to go as far as the learned judges who delivered the opinions in the Circuit and the District Court, the present case may safely be rested on two propositions:—

I. That the lender on bottomry is bound to make inquiry of the borrower as to the facts which, it is claimed, make a resort to that method of raising money a necessity.

II. That, if he fails to inquire, he is bound by the facts, as they actually exist, and cannot claim any protection as a lender in good faith without notice. And especially must this be the rule where, as in the present case, it is

sought to create a lien upon the cargo, for the purpose of making repairs which were not for the interest of the owner of the cargo, but opposed to such interest, and where the necessity for the repairs is caused by the original unseaworthiness of the vessel, so that the owner of the ship could not claim as against the owner of the cargo any contribution whatever.

There is no finding that the bond was made or received *bona fide*. The findings as to omission to inquire already stated show that as matter of law it was not made or received in good faith. The only finding which expressly mentions this subject is the fifth finding of law, which, taken in connection with the previous findings of law must be construed as meaning that, even if given and taken *bona fide*, it is held invalid for the reason therein mentioned.

The Findings Of Law

in the Circuit Court are as follows (pp. 35, 36):

I. It was the duty of the master to communicate with the owners of the cargo after its arrival at St. Thomas, and inform such owners of the probable necessity for the hypothecation of the cargo.

II. It was the duty of the lender to ascertain if such communication had been had and such information given before making a loan upon the security of the cargo.

III. No such inquiry having been made, and no such communication having been had, nor any such information given in season to enable the owners to exercise the right of taking the cargo at the intermediate port, the bond in suit, as far as it purports to hypothecate the cargo, is inoperative and invalid.

IV. Telegraphic communication having been available, it was the duty of the master, under the circumstances before stated, to resort to it.

V. The master of the ship had no authority to hypothecate the cargo, because under the circumstances of the case it was reasonably practicable for him to communicate with the owners of the cargo before doing so; and inasmuch as he hypothecated the cargo under such circumstances without so communicating with and informing such owners, the bond, though given and taken *bona fide*, is not binding on the cargo.

POINTS.

First.

Reason of the Rule as to Bottomry.

In considering the application of an old rule to the varying circumstances of commerce, it is necessary to examine the reason of the rule. The whole ground of the doctrine which allowed the master, in case of necessity, to borrow money on the credit of the cargo, for the purpose of repairing the ship, and enabling her to complete the voyage and deliver the goods, was, that it was for the interest of the owner of the cargo to have it forwarded in that ship, and that the master was, as such, the agent of all parties concerned, to act, under all the circumstances of the case, for the best interest of all.

"In all cases it is the prospect of benefit to the proprietor, that is the foundation of the authority of the master. It is therefore true that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs" (Ld. Stowell, The Gratitudine, 3 Rob. 261, p. 213, first Eng. Ed).

When the rule on the subject first assumed definite form and proportion, which was very early in the history of the maritime law, communication with foreign countries was difficult, expensive and infrequent. Hence the earlier treatises on the subject assumed that the master in a foreign port could not communicate with the owner in time to render assistance from that source of any value. They did, however, lay down very clearly the general rule already stated.

See Maclachlan on Shipping, pp. 49, 51 (2 Ed).
The Aurora, 1 Wheaton, 96.
The Bridgewater, Olcott, 35.

The present doctrine on this subject is simply a development of the well-settled principles of law, applied to circumstances which have changed. It is one of the distinguishing features of maritime law, as well as of the common law of England, that it consists, not of a mass of inflexible enactments, but of principles which develop new applications to the varying circumstances of commerce (1 *Kent Comm.* 472).

Formerly, when communication between distant ports was slow and infrequent, there was no opportunity for applying this doctrine of the necessity of communication. But now that lines of telegraph extend everywhere, and facilities of communication have been greatly increased, the rule that communication is obligatory is but an application of the rule that the captain can only bind the ship and cargo in case of necessity. Such necessity cannot appear until the owners of the cargo have had an opportunity of deciding whether to tranship it or supply the money for repairing the ship that carries it. The propriety is even more manifest in their case than in the case of the owner of the vessel; he reaps the benefit of whatever repairs are put upon the ship, but the owner of the cargo derives no benefit from these, except the forwarding of the cargo to the port of destination. If it can be forwarded by any other conveyance at an expense far less than that incurred

in the repairs, it is manifestly for his interest that no lien should be placed upon it for the benefit of the ship.

Second.

Duty of Inquiry by Lender.

It is argued that the lender in this case is an innocent mortgagee for value, and not bound to take notice of any defects in the authority of the Master. The rule regulating all cases of agents and implied authority is different. All persons contracting with an agent are bound to take notice of his authority, and if he exceed it the agent alone is liable. It is true there are cases where the agent is clothed by his principal with an apparent authority. In such cases the principal is estopped from denying that the real authority is as great as the apparent (2 Kent 641, note *b*); but no facts in this case justify the application of the latter rule. The owners of the cargo had no communication with the lender. They clothed the captain with no apparent authority except that which belonged to his position as captain.

"The master does not ordinarily represent the owner of the cargo as well as of the ship, but only in cases of accidental necessity.'

Ld. Stowell. The Gratitudine, 3 Rob., 268, p. 219, first Eng. Ed.

The question must always recur,—Did the necessity exist out of which the authority is claimed to arise?

"It is incumbent upon the creditor, who claims an hypothecation, to prove the actual existence of a necessity, or of an apparent necessity, of those things which gave rise to his demand, and which were reasonable for it, and proper for the ship, or for the voyage, under the circumstances of the case."

3 Kent Comm., 172.
The Grapeshot; 9 Wallace, 129, 141.
Thomas *vs.* Osborne, 19 How., U. S. Rep., 22, 30.
The Fortitude, 3 Sumner, 228.

Stearns vs. Doe, 12 Gray, 482, is an instructive case in this connection. That was an action against the owner of a vessel to recover moneys advanced to the captain for repairs in a foreign port. The Judge on the trial charged "That there must have been an apparent necessity for the loan, and that plaintiffs must have used reasonable care and diligence to ascertain whether or not the advances were necessary to be made at that time, and there were no facts or circumstances in the transaction, *or which could have been ascertained upon a reasonable and prudent inquiry*, to lead to a suspicion of the contrary."

This instruction was sustained by the Supreme Court, *in banc.* Bigelow, J., delivering the Opinion, said:

"The money must be necessary for the vessel, that is, it must be required for purposes which a prudent person would deem to be reasonably fit and proper *under the* circumstances in which the vessel is placed."

In this case it is found that the lender made no inquiry as to whether this necessity existed. He, therefore, voluntarily ran the risk, receiving his remuneration in the shape of a premium of 14 per cent. Had the adventure succeeded he would have been a large gainer, and those who venture money for large gains must expect to meet with occasional losses. The idea of a possible loss is involved in every contract for an unusual gain.

Under the circumstances already stated, it is manifest that the Bank of St. Thomas cannot claim to be a lender in good faith. What it loses is lost by its own negligence. Lenders in foreign ports should be taught that it is not for the interest of commerce that they should allow themselves to be silent accomplices with a fraudulent captain who betrays the interests of his owners in a foreign port. They are under no obligation to lend, but, if they do lend, they

owe some duty to the owners to see that their interest is not entirely overlooked.

The Lulu, 10 Wallace, 192, 200.

The rule is well stated by Cujacius (Opera, tom. 1, col., 1451), cited in 3 Sumner, 251.

"*Ego debeo esse diligens et curiosus, et inquirare antequam numerem pecuniam, an navis indigeat refectione.*"

So the Digest, 14, 1, 7, cited in 19 How., U. S. 30. "*Aliquam diligentiam in ea re creditorem debere praestare.*"

Third.

The Survey.

It may be said that the Bank of St. Thomas had a right to rely upon the survey. To this argument there are two answers. First, it did not, in fact, rely upon the survey. It made no inquiry whatever as to the necessity of the repairs. It knew nothing as to whether the supplies were reasonable and proper or not. All it did was to examine the value of the security offered, and see that the bond was properly executed and attested (Finding 25, p. 35). It cannot, for a moment, be contended that a bank making a loan is not bound to inquire as to the authority of the agent proposing the security, and where this authority depends, as in the present case, upon the necessity of the supplies or repairs it is bound to inquire as to this necessity. It is not denied that if this inquiry had been made and due diligence had been used by the officers of the bank, and as the result of such inquiry they had come reasonably and fairly to the conclusion that the supplies were necessary and beneficial *to the cargo* the owners could not contest this point.

Williamson *vs.* Brown, 15 N. Y., 354.

In the case at bar there was one very suspicious circumstance. The amount advertised for was seven thousand five hundred dollars. When the loan came to be closed the amount asked was eleven thousand six hundred dollars. This was enough to put the lender on inquiry, and it is chargeable with notice of whatever that inquiry might have disclosed.

4 Kent Comm., 179.
The Lulu, 10 Wallace, 192, 201.
Carr *vs.* Hilton, 1 Curtis's C. C., 390.
Baker *vs.* Bliss, 39 N. Y., 70.
The Ploughboy, 1 Gall., 41.

This inquiry would, it is found, have disclosed the facts stated in Findings 30–32, to wit, that it was not for the interest of the owner of the cargo to create a lien upon it (p. 35).

Fourth.

Communication with Owners of Cargo.

The considerations thus far presented are irrespective of the distinct proposition that the master is bound to communicate with the owners of the cargo, if possible, before he places a lien upon it. But they necessarily lead to the conclusion that this duty is obligatory upon the master, and show that the enunciation of this rule by the English Courts is not at all the adoption of a new rule, but the application of an old rule to the new circumstances and conditions which steamships and telegraph lines have created. When once it is granted, as it must be, that the right of the master to hypothecate the cargo is not absolute but limited, it necessarily follows that if communication is possible or reasonably practicable, it should be had. It is argued that in the case of a general ship, it is impossible to communicate with all the owners of the cargo, and that they might return different answers. Here again an argu-

ment from the supposed inconvenience of a case entirely different from the one at bar is sought as a reason for not applying the rule where it is simple and easy. But the alleged objection does not, in point of fact, exist at all. The object of the communication is partly to enable the owner of the cargo to supply funds to repair the ship. But also it is to enable him to exercise the option of receiving the goods at the intermediate port, and forwarding them by some other mode of transportation. If there were a hundred owners, and fifty chose to avail themselves of this option, the captain could hypothecate the cargo of the remaining fifty, and might find in the freight paid upon the goods taken by their owners, funds which would, partially at least, defray the expenses of repairs. But it is said that it would be inconvenient to communicate with a hundred persons. Possibly it might, but mere inconvenience is no reason why the owner of each parcel of cargo should not have the privilege of taking it. If communication with any of the owners were impossible, it undoubtedly would be dispensed with.

But the difficulty is mostly imaginary. The actual owners of the cargo of a general ship may be very numerous, but the consignees, who, so far as the captain is concerned, are the owners, are few in number. A ship bringing a general cargo to New York would ordinarily bring that cargo consigned to a few persons in New York. It would fall to them, and not to the captain of the ship, to distribute the several consignments among the actual owners.

Fifth.

The English Decisions on this Subject are Explicit.

"The master of a ship has not authority to hypothecate the cargo, if, in the circumstances of the case, it is reasonably practicable for him to communicate with the owners before doing so; and if he hypothecate the cargo in such circumstances without so communicating, the bond, though given and taken *bona fide*, is not binding upon the cargo."

The Bonaparte, 8 Moore, P. C. 459.
The Hamburg, 1 B. & L., 253.
The Panama, L. R. 3 P. C. Ca. 199.

The facts are that there were not only ample facilities of communication, both by mail and telegraph, which were not resorted to, and which were used for other purposes, but that, so far as any exigency of the cargo was concerned, there was time enough between the date of arrival at St. Thomas and the departure thence for the master to have reported to the owners personally (Findings 16, 17, p. 34, 29, p. 35.) In fact, the cargo could not be said to be in any peril whatever, nor was there any prospect of benefit to it from bottomry, which could not have been obtained by trans-shipment (Findings 29–32, p. 35).

It is urged by the libellant that it was as easy to communicate with St. Thomas from Philadelphia or Rio, as from St. Thomas with either of those places, and that inasmuch as Lamb & Co. informed the shipper of the cargo that the ship had put into St. Thomas disabled, it was as much their duty to communicate instructions to the master as for him to seek instructions from them.

A general answer to the argument is, however, that a duty of communicating is devolved by law upon the master, the non-performance of which is not excused by showing that another person has omitted to do something which no obligation rested upon him to perform.

Referring, however, to the shipper of the cargo, a more particular answer is, that with this letter of June 1 in his possession, it would have been presumptuous on his part to assume, in the absence of communication from the master, that occasion for his interference to protect cargo existed, or that an emergency had arisen in which their interests would not be protected by the rule so emphatically asserted, of the primary obligation on the part of the ship and its owner, to look out for the general welfare. Under such circumstances for the owners to volunteer suggestion or

advice would be to create the embarrassment depicted as so disastrous, which arises when the sense of duty in the mind of the master is complicated by outside interference.

The natural inference from the letter of June 1, is that a cargo, which in itself was imperishable (Finding 29, p. 35), called for no special action on the part of its shipper, and the most natural reply to such a letter is not an offer of funds, but an inquiry for particulars. It is significant that Lamb & Co. do not produce Mee's answer to this letter, though in their letter No. 7, p. 38, they admit receiving such an answer.

The duty of the master is not performed by a statement ever so detailed of the circumstances of the disaster.

> Kleinwort *vs.* Cassa Marittima, *L. R.* 2 *Adm. Appeals*, 156.

Appellant's Counsel asserts that these cases are not approved in any American case. This is an error. They were followed by the Court of Claims in Goodwin's case, 6 Ct. Claims Rep. 146. No appeal appears to have been taken to this Court, and it is fairly to be inferred that Counsel for both parties acquiesced in the reasonableness of the rule.

Sixth.

The English Decisions Controlling.

The argument for the libellant is a concession, that if the authorities thus cited were controlling, they would be decisive of the case at bar; but it insists that they are not controlling, because the rule they lay down is an innovation.

The illustration of a general ship is resorted to as a reason why, whatever other rule might be adopted, the one under discussion would not be. But a principle is conceded which robs the illustration of its point, viz.: that the master must

do what is best for the whole adventure; a principle which underlies the whole matter of hypothecation, and within which, apart from any special rule or regulation, the duty of a master, in cases like the present, to communicate with owners of cargo would be included.

The Court said in "The Karnak" (*L. R.* 2, *Adm., and Ecc.* 289; S. C., affirmed, *L. R.* 2, *P. C.*, 505):

"The power of the master in bottomry arises out of his relation as agent, both to the owner of the ship and of the cargo. A material distinction exists between his authority as agent for the one, and as agent for the other; *but in both cases, his power to hypothecate, like his power to sell, arises out of the necessities of the case.*"

This is but the same principle differently stated, and is, in effect, to say that the "necessity of the case" does not demand or justify hypothecation where a communication is practicable, through which it may by possibility be avoided.

A rule can hardly be called an innovation, which was assumed in "The Gratitudine" (3 *Rob. Adm.*, 240, p. 196, first Eng. Ed.) in 1801, by Lord Stowell, who there says:

"It is said he (the master) might have written to the proprietors (owners of cargo), but it does not appear that he knew who the proprietors were. * * The Court would undoubtedly be very unwilling to relax the *general obligation of masters to correspond with the proprietors when it is practicable*" (S. C., p. 259, p. 222, first Eng. Ed.).

The illustration of the general ship was equally unfortunate in this aspect. It treats the rule as imperative *in all cases.* But this it is not.

In the Hamburgh, *supra*, Dr. Lushington, referring to the Bonaparte, puts it thus:

"Their Lordships state in substance, that before the master executes a bottomry bond binding the cargo, it is

in general his duty to communicate with the owners of the cargo, or attempt to do so. They state that this is not a universal, but a general rule. The consequence of this judgment is, that in all cases where the owners of the cargo contest the validity of the bond upon the ground that the master did not communicate with them, this Court must determine whether the circumstances constitute an exception to the general rule."

The whole commercial law is made up of principles avowedly flexible so as to apply to the varying circumstances of commerce to which rigid rules are inapplicable.

These English decisions do not profess to be based on any custom peculiar to England or any local statute or municipal regulation. The English Admiralty Courts have been very much limited and restricted in their jurisdiction by acts of Parliament, going back to the time of Richard the Second. But it never has been disputed that in all matters to which their jurisdiction extended they administered, not the municipal law of that country, but the general maritime law of all commercial countries (1 *Kent Comm.* 376; *Benedict Adm.* § 46; De Lovio *vs.* Boit, 2 *Gallison*, 398). It is equally well settled that the Admiralty Courts of this country administer the general maritime law of commercial nations, and while the limitations that have been placed by Parliament upon the jurisdiction of the English Admiralty Courts have been disregarded in this country, yet the decisions of the English Courts as to all matters within the scope of their jurisdiction are uniformly cited as authority in our Courts.

See

The "Eagle," 8 *Wallace*, 15.
The "Genesee Chief," 12 *How. U. S. Rep.*, 443.
Benedict Adm. § 41.

It is obviously exceedingly important that the law on this subject as administered by the commercial tribunals of England and America should be the same. The whole

theory of the commercial law is that it is uniform every where. No doubt there are exceptions to its uniformity, but it cannot be denied that it is very desirable that these exceptions should not be increased.

Seventh.

The Right to Take the Cargo at an Intermediate Port.

The principal argument on the part of the libellant, in reply to the reasoning of the English authorities, is based upon a denial of the right of the owner of the cargo to reclaim it at an intermediate port. It is contended that the effect of the contract of affreightment is to give to the owner of the ship an absolute right to complete the transportation of the cargo, and that no subsequent emergencies, except the total loss of his vessel, can divest him of this right. The conclusion sought to be drawn from this position is, that no benefit, excepting possibly the saving of the maritime premium, would be derived by the owner of the cargo, from a communication by the master of his need for money or of the alleged necessity for a bottomry bond to raise it.

The condition of the owner of the cargo, if this be sound, would be hard indeed. But it is believed that the position of the libellants in this particular is untenable.

It is true that the question has generally arisen in cases where the sufficiency of the tender, made by the owner of the cargo on demanding his goods, was contested. Still, the very fact that these cases were contested on this point alone is a demonstration that not only the Court, but the counsel on both sides, agreed that there was a right on the part of the owner of the cargo under certain circumstances to reclaim his goods.

As long ago as the Consolato del Mare (Article 84), the rule was established "that if the goods are on board and the voyage has commenced and the merchantman wishes to

withdraw his cargo, he is bound to pay the whole stipulated freight."

This is quoted and approved by Chancellor Kent, delivering the opinion of the Court of Errors in Palmer *vs.* Lorillard, 16 Johns, 364 *et seq.* To the same effect are

3 Kent Comm., 228.
The N. Hooper, 3 Sumner, 555.
Bedarride Du Commerce Maritime, Tome 3, p. 63, § 881.

A similar rule is laid down in regard to the right to reclaim the goods before the voyage begins.

Tindall *vs.* Taylor, 4 Ellis & Bl., 219.
Bartlett *vs.* Carnley, 6 Duer, 194.

The objections suggested by the libellants' counsel to this rule simply show, that circumstances can be imagined, in which it might be very inconvenient for the master of the ship to deliver the cargo at an intermediate port, and the conclusion is sought to be drawn, that because in some cases this would be inconvenient, therefore, it should never be allowed in any case, and more especially should not be allowed in the case at bar, inwhich the delivery of the cargo there would not have been attended with the slightest difficulty or inconvenience. In fact the captain discharged and stored the cargo.

It is clear that if the consignee has the right to demand the cargo at an intermediate port, and it becomes manifest at such port that it is for his interest that it should be demanded, the captain is bound either to offer to the consignee the option of taking the cargo, or to himself discharge the cargo and exercise the option on behalf of his principal. In other words, it can never be contended that the implied authority with which the master of the ship is clothed, extends so far as to authorize him to repair the ship at the expense of the cargo, and at an expense greatly ex-

ceeding the freight, for the purpose of enabling him to transport imperishable cargo to the place of destination, from an intermediate port with which communication is easy and frequent. "*Il est le représentant des chargeurs absens: et doit faire ce qu'ils feraient eux mêmes' s' ils étaient sur les lieux*" (Boulay Paty Droit Comm. Marit., Tome 2, p. 404, Ed. 1834). The whole theory that the cargo is to be transported to the place of destination, implies that it is for the interest of the consignee to have it transported, and the moment that the ground fails on which this implication is based the implied authority must necessarily fail. In the case at bar, what do we see? A vessel is at an intermediate port; it is ascertained by a survey that extensive repairs are necessary to enable her to complete her voyage. The libellant takes it for granted that it was necessary that she should complete her voyage. Herein consists the fallacy of the whole argument. If the voyage was interrupted by a peril insured against, and the repairs of the vessel exceeded her value, it was the right of the master to abandon her to the underwriters (3 Kent, 329). If, on the other hand, she was so unseaworthy when she put to sea that she was unable to complete her voyage, not by reason of a peril insured against, but by reason of her own intrinsic defects, it cannot be claimed that the master on behalf of the owner of the ship, being himself at fault for undertaking a voyage in an unseaworthy vessel, could have the vessel repaired at the expense of the cargo for the purpose of enabling him to make good the injury occasioned by his own negligence or that of the owner.

The admission of unseaworthiness made by the libellant's counsel in the District Court, is stated in the Opinion of the District Judge, which forms a part of the record. It is true that the Opinions cannot be referred to for a statement of evidence or facts established by evidence. But nevertheless they form a part of the record, and constitute a statement signed by the Judge in the Court below. Admissions contained or stated in the record form part of

the material upon which the judgment of this Court is based.

The Sun Mutual vs. The Ocean Mutual, Oct. Term, 1882, No. 119.
1 Desty, Supreme Ct. Rep. 582.

Much stress is laid on the alleged liability of the cargo in general average. If the Court treat this admission of unseaworthiness as in the case, that question is out of it. If otherwise, then we reply. It is a matter of constant practice to release cargo upon the owner's giving an average bond. There could be no difficulty in the giving of his at St. Thomas.

The Appellant cannot avail in this suit of any supposed claim to a lien for general average, for none such is alleged in the libel. The suit is on the bond, and on that alone. The findings are solely on the issues raised by the pleadings, and this Court has not the evidence before it to justify an amendment or enlargement of the pleadings, even if at this stage of the case that should ever be allowed.

Eighth.

The Master's Agency.

Counsel for the appellants elaborately argue that the master's authority to hypothecate the cargo cannot be tested by the law of agency, because he acts "in the exercise of a *right*, in which it is presumed that the master will act contrary to what would be the *permission* of the owner of the cargo, if he were present." He likens the hypothecation to a forced loan.

No doubt there may be an irrevocable power given by contract. And in this sense the holder of the power may lawfully contravene the subsequent directions of the party conferring it.

But it is believed that the authorities cited go no further than this. And the question therefore must always recur—What is the extent of the authority originally conferred? The ship and cargo are reciprocally bound and owe reciprocal duties. It cannot be that the interest of either is alone to be consulted. And once it is conceded that the master or owner of the ship may abandon her to the underwriters, and is not bound to repair, irrespective of expense, it follows by necessary implication that the cargo may be released from its obligation under corresponding circumstances, and need not be sacrificed to recover a worthless ship.

Duncan *vs.* Benson is cited to show that the owners of the cargo have a remedy against the owners of the ship. Whether this decision would be followed in this country need not now be considered; a sufficient reply is that this doctrine might be advanced in support of a bond accepted after due inquiry by the lender. There it might be said that if the owner is wronged he has redress, but a lender who advances money without inquiry takes his own risk as has been shown. If it was wrong to borrow, he is chargable with notice of the wrong, not as an actual and fraudulent participant, but by reason of his own laches.

Ninth.

Communication made was Inadequate.

Telegraphic communication could have been had with the consignees and owners of the cargo who were in Philadelphia. The captain knew who and where they were (Findings 3, 16, pp. 33, 34). He was, therefore, bound to telegraph them. His statement to Lamb & Co. that he had forgotten does not prove that fact. Six days after the cargo was libelled in New York, the captain swore to a claim in which he stated that Winthrop Cunningham & Sons were the owners of the cargo (p. 3), thus showing that in

fact he had not forgotten who they were. They afterwards interposed a claim themselves (Pp. 4, 5).

Telegraphic communication with Rio Janeiro was available as long as the "Julia Blake" remained at St. Thomas, though not as expeditious after July 21 (Findings 17, 18, p. 34). It was the captain's duty to act promptly upon his arrival. He recognized his obligation to the owner of the ship, by writing and telegraphing him at once. Lamb & Co. recognized the obligation to the shipper of the cargo, by writing him, though not as promptly. The fatal error was in omitting to telegraph, and the obligation to telegraph became imperative the moment it was decided to discharge the cargo. Then was the time for its owner to decide whether to tranship, and he ought to have been notified immediately. There was ample time between then and July 21 to have telegraphed and received an answer, and no excuse for the omission is suggested, except the expense, which is trifling, when compared with the bills actually paid.

The libellant cannot claim to have been misled by the captain. Its officers made no inquiry, and must therefore stand or fall, as the facts actually were.

If communication was obligatory, the parties bound to make it were bound to use the telegraphic cable.

The Circassian, 3 Bened., 398.

It is argued that Lamb & Co. were the agents of the shipper, and that therefore notice to them was notice to him. In this connection the captain's failure to show them his letter of instructions is material. In their letter (Ex. 7, p. 39), they advert to this and say:

"The control intended to have been placed with us remained, in part at least, in hands of the captain as master of the vessel."

They made no inquiry as to the necessity of the repairs and supplies (Finding 21). They did not know, and there-

fore neither did nor could accept the authority which Mee intended to confer. Notice to them was therefore ineffective, even if it could be claimed that they were ever intended to be clothed with authority to receive it, which nowhere appears.

Tenth.

Conflict of Laws.

There was considerable discussion in the Court below as to the Danish law, which is operative in St. Thomas. There is, however, no finding on this subject, and it will not be presumed to differ from our own.

1. It was not contended that even by the Danish law parties furnishing supplies or repairs to a vessel, could recover from the cargo, unless the supplies were reasonably necessary, having in view all the circumstances of the case. How can it be contended for a moment that the repairs and supplies were necessary in this case, when it is found that they were inexpedient, so far as the cargo was concerned. The injuries to the vessel, the character of the cargo, the fact that it had already been discharged by the master and was then on storage, could all have been ascertained by the lender, if it had taken the trouble to inquire. It manifestly could never be for the interest of the owner of the cargo to place upon it a lien of eleven thousand six hundred dollars, with fourteen per cent. interest, for the sake of enabling the master of the ship to earn four hundred and fifty dollars, the unpaid balance of freight. If the lender had examined the subject at all, or made the slightest inquiry, it could not have come to the conclusion that the repairs to the extent mentioned were necessary, much less expedient.

2. It is well settled that a party claiming under the execution of a power, must show the existence of the facts which authorize the donee of the power to exercise it.

Briggs vs. Davis, 20 N. Y., 15.
Russell vs. Russell, 36 N. Y., 581.

This rule is analogous to that contended for here, and it does not appear that the Danish law differs at all from ours on this subject.

3. There is no finding that by the Danish law, the supplies furnished, and repairs made, constituted a maritime lien upon the cargo. Even if it were established that the cargo was liable to attachment in an action at the suit of material men, this fact would not entitle the holder of a bottomry bond, otherwise invalid, to a lien upon the cargo.

The Aurora, 1 Wheat., 96, 104.
The Osmanli, 3 W. Rob., 198, 212.
The Augusta, 1 Dods., 283, 288.

But, the validity of this bond is not to be determined by the law of St. Thomas. Its validity depends upon the authority of the Captain, and his authority depends upon the nationality of his vessel and the law of that nation. The brigantine being a British vessel, his authority is to be determined by the English law.

The Woodland, 14 Bl., 499, affg. 7 Bened. 110.
The Gaetano Marie, Mitchell's Maritime Reg., May 19, June 2, 1882, pp. 620, 685. Judicial Committee Privy Counsel reversing S.C. in Admiralty.
Pope vs. Nickerson, 3 Story, 477, 480.

Even if it were otherwise the validity of the bond would not depend upon the Danish law.

The bond is payable in New York by its terms, p. 12 marg. paging 27. In such cases, subject as we contend to the exception just stated, it is the law of the place of performance by which the validity, nature, obligation and interpretation of the contract are to be determined.

Story Conflict of Laws, § 280.
Bell vs. Bruen, 1 Howard U. S. Rep., 169, 182.
Cox vs. U. S., 6 Peters, 175, 202.
Burkle vs. Eckhardt, 3 Comst., 132.

Eleventh.

The decree appealed from should be affirmed with costs.

EVERETT P. WHEELER,

Advocate for Claimants of Cargo, Appellees.